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OCTOBER TERM, A. D. 1889.

No. 1286.

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Appeal from Circuit Court of the United States for the Northern District of Illinois.

BRIEF AND ARGUMENT FOR APPELLANT.

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STATEMENT.

On the 19th day of July, 1883, James S. Waterman, being then a resident of Illinois, died in said state. In the will of said Waterman, afterwards duly proven in the County court of DeKalb county in said state, appellees, Alden and Robinson, are named as executors and trustees.

Appellant resides in California. At the time of the death of the testator, appellant and one Porter were engaged in business in California as partners under the name of Waterman and Porter. The testator had made advances of money to his brother, the appellant, which had been used in the business of Waterman and Porter. At the time of his decease, testator held certain

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notes for said advances, each signed by Waterman and Porter. The account books of testator show a still further charge against Waterman and Porter of a small sum as expense incurred in or about the business of said firm. The total amount of said notes and account is $11,904.51; and under the statutes as well of California as of Illinois, this was the several debt of each as well as the joint debt of both. Not only so, but the first of the notes, being for $7,500, was on its face the several note of each maker.

Appellant, as he testifies, first saw a copy of his brother's will on the 18th day of September, 1883. Prior to that time, as he claims, he had no definite knowledge as to the provisions of said instrument, and particularly as to section 7 thereof, hereinafter quoted. On the 12th day of September, 1883, appellant caused to be transmitted to appellees, as executors, a bill of exchange drawn by the Bank of California, for the sum of $11,504.51. The balance of the debt to testator, namely, $445, was paid to the executors after said 18th day of September, 1883, and on February 8, 1884.

In his said will, testator devotes a part of his estate to certain legacies not necessary to be here noticed. Another part of his estate which he describes as "any and "all notes, bills, accounts, agreements or other evidences "of indebtedness against any of my said brothers or sisters "held by me at the time of my decease * * * ex- "cept two notes I hold against John C. Waterman," he likewise makes the subject of a special disposition. All the residue and remainder of his estate he gives to appellees in trust to take care of and manage the same for twenty-one years. The annual income is given in equal shares to his brothers and sisters, and he directs the trust-

ees "to pay over" annually to each, his or her share of such income. At the end of said period of twenty-one years the trust ceases, and said residuary estate goes in equal shares to said brothers and sisters, his or her children representing at all times any deceased brother or sister.

The seventh clause of the will is in words following: "I desire and direct that any and all notes, bills, accounts, "agreements, or other evidences of indebtedness, against "any of my said brothers and sisters held by me at the "time of my decease, be canceled by my said executors "and delivered up to the maker or makers thereof without "payment of the same or any part thereof, except two notes "I hold against John C. Waterman, one for $8,000, dated "August 10, 1870, and due January 1, 1871, and one for "$4,600, dated November 28, 1870, and due six months "after date, and both secured by trust deed upon land in "Johnson county, State of Missouri, which notes I desire "and direct to be collected and equally divided between "my said brothers and sisters, the child or children of a "deceased brother or sister to take the same share the "father or mother would have taken if living."

The testator left no children; his sisters and brothers (of whom as already appears John C. was one and appellant another) were the natural objects of his bounty. The estate is entirely solvent and sufficient in volume to satisfy all requirements of the will.

Upon consulting counsel after he had caused the payments to be made to appellees as above stated, appellant concluded that the debt so paid had been given to him by the seventh clause of his brother's will. He thereupon requested appellees to repay the amount to him as his legacy under said will. Appellees refused and appellant

thereupon filed his bill setting up the facts and asking for a construction of the will in accordance with his theory of the law. Appellees answered, and upon final hearing, the court construed the seventh section of the will as not including a debt of the kind here shown, and thereupon dismissed the bill for want of equity. Appellant brings the record to this court, and the following are the questions involved:

1. Is there anything in the general language of the seventh clause, namely: "any and all notes, bills, accounts, "agreements, or other evidences of indebtedness against "any of my said brothers and sisters, held by me at the "time of my decease," which necessarily excludes an indebtedness of the kind owed by appellant to the testator as above herein described?

2. Is it not the rule that a bequest in general words, includes everything capable of being comprehended under said general words, which the testator had power to dispose of?

3. Does not the specific exception of the debt of testator's brother John, which was secured by trust deed on land, indicate that, within the understanding of the testator, the words of the bequest included all debts, secured as well as unsecured?

4. Would not a construction limiting the general words of the bequest to the personal and unsecured debts of each legatee, and excluding any debt of the legatee which might be secured by the personal obligation of a third person, have the effect, in certain obvious contingencies, of impairing the benefit conferred on such legatee by the gift of annual income, and of contradicting the direction to *pay over* such income? Is it law, that a contradiction be-

tween provisions not necessarily at variance, can be *construed* into a will?

5. Does the fact that the debt in question was paid to the executors, in any way prevent appellant from claiming the amount as a bequest to him under the will?

6. If ~~it be~~ the doctrine that a payment under a mistake of law has any application to such a case as this, is it not shown by the evidence that the payment was made through mistake of fact?

Assignment of Errors.

1. The court erred in dismissing complainant's bill for want of equity.

2. The court erred in refusing the relief prayed for in said bill.

3. The court erred in refusing to adjudge and decree that said executors, as such, were liable for the repayment of the moneys sought by said bill to be recovered.

4. The court erred in refusing to adjudge and decree that said executors repay three-fourths of said moneys.

Brief of the Argument.

1. The said seventh clause of said will imports a legacy; it is not a testamentary act in the nature of a release. It is not a renunciation or abandonment of part of the estate, but a gift of part of the estate which the executors were not bound to collect and distribute for the sole reason that the death of the testator found already in the hands of the legatee what testator intended to give him.

11 Roper on Degacies, 66.
Izon v. *Butler*, 2 Price, 34.
Elliott v. *Davenport*, 1 P. Wms., 83.
Toplis v. *Baker*, 2 Cox, R., 118.

2. The rule of construction is, that a bequest in general terms *prima facie* includes every thing, capable of being comprehended under said general terms, which the testator had power to dispose of. This is the fundamental and tacit assumption of courts and text writers in developing rules of construction.

II Jarman on Wills, 564, and cases cited.
1 Redfield on Wills, 386.
1 Roper on Legacies, 212, 213, 221.
Morrice v. *Aylmer*, 44 L. J, Chy., 614.
Wigram on Interpretation of Wills, 28, 331.
Foote's App., 22 Pick., 302.

3. The debt in question was the *several* debt of appellant to the testator.

Sec. 3, Chap. 76, R. S. of Illinois.
Deering's Ann. Stat. of Cal., Vol. II (Sec. 1,639), p. 308.

Marine Bank v. *Ferry*, 40 Ill., 255.
Gage v. *Mechs. Nat. Bank*, 79 Ill., 62.
People v. *Harrison*, 82 Ill., 84.
Byers v. *Nat. Bank*, 85 Ill., 423.
Stearns v. *Aguire et al.*, 6 Cal., 176.
People v. *Love et al.*, 25 Cal., 521.

4. That the testator did not mean to confine his bequest to such debts as were secured only by the personal engagement of the debtor brother or sister, is shown by his specific exception of a debt of his brother John, which was secured by trust deed on land in Missouri.

II Jarman on Wills, 359.

5. The express direction that the one debt, namely, that of his brother John was to be *collected*, implies that in the mind of the testator his executors were not in any other case to have an action against any brother or sister.

6. A gift or legacy imports a bounty or personal benefit to the legatee. In addition to the gift of income made in section 4 the trustees are expressly directed to *pay over* his share to each legatee. Appellees' construction of the seventh section would necessarily, in certain obvious contingencies, impair the benefit bestowed in the fourth, and contradict the direction to pay over.

Bates' Exr. v. *Hillman*, 43 Barb., 645.

7. The payment to the executors of the debt in question is immaterial. In the hands of appellees the proceeds of the debt is part of the estate. If it be the sense of the will that said debt is given to appellant, then appellees must pay him the proeeeds; and under the Illinois statute they must pay at once.

Sec. 115, Chap. 3, R. S. of Illinois.

8. Appellees should have receipted to appellant for the entire debt, and he should then have taken credit on the books of Waterman and Porter for the amount. That appellant did not insist upon this course was due, as will be shown in the argument, to mistake of *fact* on his part, as well as to mistake of law.

9. The rule that money paid under mistake of law cannot be recovered back, has no application where the receiver of the money is in any sense a trustee for the person who pays.

10. The doctrine of estoppel by acquiescence has no application to the case at bar.

11. The rule as to mistake of law has been modified, so that to prevent injustice a mistake of law will be treated as a mistake of fact.

ARGUMENT.

I.

CONSTRUCTION OF THE WILL.

The question whether a particular provision in a will disposing of a debt owing to the testator, is a legacy or a release, arises in cases where the intended beneficiary dies prior to the death of the testator. A legacy in such case lapses; a release, on the contrary, enures to the benefit of the estate of the person released. If, in such case, it appears on the face of the will, either expressly or by implication, that in the event of his death prior to the death of the testator, the beneficiary's estate should succeed to the benefit, or if it appears that the debt is not to be treated as part of the testator's estate, then the provision is a release. Again, if the debt which is the subject-matter of the provision is owed by the proposed beneficiary and another jointly, or jointly and severally—a partner in business for instance—then, if the provision be a release, both debtors have the benefit; but if a legacy, the legatee alone gets the benefit—he, in effect, pays the firm debt with his legacy, and is entitled to credit for the amount on the firm books.

The subject-matter of the provision in the case at bar, is such that said provision cannot be construed as a release. What the testator disposes of is, "any and all "notes, bills, accounts, agreements, or other evidences of "indebtedness against any of my brothers and sisters "held by me at the time of my decease." Any debt owed by any brother to the testator at the time of the de-

cease of the testator, he at that time gives to such brother. Obviously such brother must then be living, otherwise he could not then owe the debt or receive it as a gift. In brief, the testator treats a debt owing to him by any one of his brothers or sisters as being part of the estate left by him, and he gives to said brother or sister whatever he or she would otherwise have been bound for to the executors.

The sense of the seventh section is therefore precisely the same as it would have been had the testator used the words: "I give to each of my brothers and sisters any "and all notes, bills, accounts, agreements, or other evi- "dences of indebtedness against him or her held by me at "the time of my decease. But I except from this provis- "ion two notes of John C. Waterman" (naming dates and amounts) "which are secured by trust deed on certain "lands in Missouri. This debt my executors are to col- "lect and divide the proceeds equally between my said "brothers and sisters," etc.

There is nothing in the case which gives rise to any latent ambiguity in the language of the will. The point therefore is, does the will show on its face any limitation which excludes from the bequest of his own debts to each legatee, a debt of such legatee which was secured to the testator by the personal liability of a third party? The testator gives to appellant "any and all notes, bills, ac- "counts, agreements, or other evidences of indebtedness" held against appellant by the testator at the decease of the latter. In other words, testator gives to appellant all debts for which the latter may be liable to the former. Is the debt in question *necessarily* excluded by anything in the words made use of in this bequest? In strictness it is a debt which appellant owed to the testator when the latter

died. That it was secured by the additional liability of Porter does not *necessarily* affect the matter.

Beyond question the terms of the bequest *may* include all debts of the legatee, whether so secured or otherwise. Conceding for the sake of the argument that said terms do not *necessarily* include such debts so secured, what is the rule of construction? Where a bequest is made in general terms, everything capable of being comprehended under the general terms and which the testator had power to dispose of, must be held to pass to the legatee, unless something to the contrary appears in some other part of the will. Says Redfield, Law of Wills, Vol. I, p. 386, "general devises and bequests seem to have been "universally construed to include all which it was in the "power of the testator to dispose of." Says Jarman, Vol. II, p. 364, "these cases," meaning cases stated and commented on in the text, "indicate the disposition of the "judges of the present day to adhere to the sound rule, "which gives to words of comprehensive import their full "extent of operation, unless some very distinct ground "can be collected from the context for considering them "used in a special or restricted sense."

A debt for which appellant was liable jointly with another would have come within the general terms of the bequest. But the debt here in question was the several debt of appellant, and in the absence of the seventh section of the will appellees as executors could have sued appellant alone. The note for $7,500 made in California is in terms the several obligation of appellant. The other notes were made in Illinois. The statute of California is in words following: "Where all the parties who unite "in a promise receive some benefit from the consideration, "whether past or present, their promise is presumed to

"be joint and several." The statute of Illinois is in words following: "All joint obligations and covenants shall be "taken and held to be joint and several obligations and "covenants."

The law of these states is further shown by the cases cited in the brief.

From the standpoint of the testator and these appellees, the executors of his estate, the circumstance that a partnership existed between appellant and Porter, and that the money advanced was used in the firm business, is immaterial. The latter is bound for appellant's debt, simply because he so contracted.

The case, therefore, as has already been suggested, comes to this: is there anything, either express or implied, in the will, which shows that a debt of a legatee, secured by the personal obligation of a third person, is not part of the bequest made in the seventh section?

On the contrary it affirmatively appears on the face of the will, that a secured debt does come within said bequest.

Immediately following the bequest and in connection therewith, the testator says in substance: "I except from "this provision one debt of one of my brothers, namely, "two notes which I hold against my brother John and "which are secured by trust deed on certain land in Mis-"souri. My executors are to *collect* this debt," etc. In different senses the trustee as holder of the legal title, and the holder of the equity of redemption as general owner, were each bound to the testator for this debt. By expressly naming this debt as one to be excepted from the bequest, the testator indicates his own understanding of the words made use of in the bequest. His construction

was that those words would include all debts whether secured or not. Hence the need of expressly excepting such secured debt from said bequest.

Says Jarman, Vol. II, p. 359, "a conclusive ground for "giving to equivocal words their larger signification, occurs "where the bequest contains an exception of certain things, "which such bequest, according to its restricted construc- "tion, would not comprise; the testator having in such a "case offered a key or explanation to his own ambiguous "language by showing that he considered that the bequest "would, without the exception, have included the ex- "cepted articles."

In order to exclude John's said debt from the bequest to him, it was necessary only that the will should name it as excluded. But the testator proceeds to *direct* that this debt be *collected*, meaning that his executors shall sue for it if necessary. This the executors would have been bound to do without any such direction. Why the direction, then? Obviously the idea in the mind of the testator was that no suit of any kind should ever be brought against any of his said brothers and sisters other than for this debt against John. In his mind no proceeding to enforce any liability to his estate was ever to be commenced against any brother or sister other than in the particular instance named by him.

Again, in the fourth section of the will testator gives to each of his brothers and sisters a share of the annual income to be yielded by that part of his estate which is to remain for twenty-one years in the hands of the trustees; and he thereupon *directs* the trustees to *pay over* aunually to each his or her share of said income. Apart from the specific direction to *pay over*, the gift itself, within the

well-established rule of construction, would import a bounty or personal benefit to each legatee; and as such it is not to be impaired or overridden by any other provision of the will unless the intent of the testator to that effect be clear and unequivocal. But if it clearly appears from some other part of the will that in a certain contingency his share of the income is not to be *paid over* to any particular brother, then and in such contingency, the direction to *pay over* must be regarded as countermanded.

For instance, suppose that the legatee John were insolvent, and his debt to the estate specified in the seventh section could not be collected, appellees would be bound under the will to credit him with his annual legacy till said debt were paid. To that extent the direction to *pay over* said legacy to John, is clearly countermanded in the seventh section.

Suppose, again, that both appellant and his co-debtor Porter had been insolvent, and that the debt here in question had not been paid to the estate and could not be collected, and the question arises, shall appellees "pay over" to appellant his share of income as directed in the fourth section, or shall they credit him with so much paid on his old debt to the testator? In the seventh section every debt for which appellant is in any manner holden by the testator is given to appellant. The terms of this bequest are so broad and general that the said debt *may* be included therein; and the rule of construction requires that the most comprehensive meaning shall prevail in the absence of anything to the contrary in the will. But apart from this last rule, is it competent to construe the general words of this bequest in their narrowest sense, and in a sense which they do not necessarily bear, when such construction will make the seventh section countermand what is expressly directed in the fourth.

It is not law that a construction which does no violence to the language of a will, and under which all provisions are effective and harmonious, can be rejected in favor of another construction which would make one provision contradict another.

In the light of the direction "to pay over," etc., the legacy given in the fourth section, it must have been the intent of the testator in framing the seventh section, that in no contingency and in no event should any one of his sisters or brothers—other than his brother John in the instance mentioned—be treated as debtor to the estate by reason of any pecuniary obligation to the testator outstanding at the time of the latter's decease. In other words, the bequest in the seventh section comprehends any sort or kind of debt owing to the testator, which, in the absence of said seventh section, would have justified the executors in withholding the legacy provided in section four, and crediting the same to the legatee as so much paid to the estate on said debt. Since the seventh section (barring the debt of John, therein specified), *can* be construed so as not to interfere in any event with the direction to "pay over" in the fourth section, such *must* be the meaning.

A statute of Illinois is in words following:

"Whenever it shall appear that there are sufficient "assets to satisfy all demands against the estate, the court "shall order the payment of all legacies mentioned in the "will of the testator, the specific legacies being the first "to be satisfied." Sec. 116 Admn. of Estates.

Appellees, as executors, have no option in the matter of further withholding from this appellant his legacy. If the court should be of opinion that the construction of the bequest as here contended for, is sound, then it was error to dismiss the bill for want of equity.

II.

FURTHER CITATIONS AND SUGGESTIONS ON THE CONSTRUCTION OF THE BEQUEST.

"Debts include whatever falls within the description of "a debt, and will pass to the legatee as money owing on "bonds, notes, mortgages, etc."

1 Roper on Legacies, 212, 213, 221.

Judgments also are included where the words were "all debts, * * * whether by mortgage, bond or "open account * * * owing by the late J. C."

Stenhouse v. *Mitchell*, 11 Ves., Jr., 352.

Debts include those contracted in a foreign country after making the will and secured on property there.

Reeves v. *Brymer*, 6 Ves., Jr., 519.

"His bond for £400" was held a legacy of it, though it was a joint bond of brother and nephew.

Maitland v. *Adair*, 3 Ves., Jr., 230.

"I remit and forgive to * * * the sum of £500, "which he stands indebted to me on his bond," held a legacy of a joint bond.

Izon v. *Butler*, 2 Price, 34.

A will not to sue may operate as a gift.

Reeves v. *Brymer*, *supra.*

The gift of a debt operates as a legacy, though called a release.

Rider v. *Wager*, 2 P. Wms., 331.

A gift to one is individual, though made on account of loss by his firm.

Parsons on Partnership.

Campbell v. *Mullett*, 2 Swanst., 582.

Testator was careful to guard against a brother's liability to suit, and to insure an equal annual dividend. If sued alone, as he might have been, could he not have plead clause 7 in bar?

The language of the will is quite similar to the Illinois Statue of Limitations, section 16: "Actions on bonds, "promissory notes, bills of exchange, written leases, "written contracts, or other evidences of indebtedness in "writing," etc.

If the statute had run against the written obligations in question, none would pretend Robert could not plead it, yet such a plea is personal.

Thomas v. *Mueller et al.*, 106 Ill., 36.

The will is broader than the statute, for it is not limited to writings.

It will be conceded that if this debt was created for the uses it was put to, but evidenced by Robert's note only, it would be within the terms of the will, notwithstanding Porter's continuing liability to Robert on accounting for one-quarter.

Non constat, but John C. Waterman's $30,000 so secured was used by a firm of which he may have been a member. Partnership and use are extraneous matters.

Repugnancy is sometimes aided by parol, but evidence is never received to alter a gift.

Jarman on Wills, 3d Ed., Vol. 1, pp. 303–5.

Why interpolate into the will the words, "except joint and several obligations", and thus constructively qualify the generic words "bills, notes, accounts, agreements", and that sweeping residuum expression "all other evidences of indebtedness", and thereby, possibly, prevent

Robert from reaping any pecuniary benefit from the will during his natural life?

To do so involves a departure from the canons of construction concerning demonstrative bequests.

It is not deemed important to dwell upon the third and fourth assignments of errors, other than to say that while the executors answer they hold this fund officially, yet if held in contravention to the will they are individually liable also for the amount found to be in their hands in any capacity.

III.

ASSUMING THE FOREGOING CONSTRUCTION CORRECT, IS THE RIGHT OF RECOVERY GONE BY PAYMENT?

Issue is joined on the question of payment in ignorance of clause 7, and, though on the hearing before the Circuit court the right of recovery was conceded if the obligations come within the scope of the will, yet counsel may desire to discuss it here; hence this further argument.

Our contention is, first, that these payments were made in ignorance of clause seven. Second, that they were made in ignorance of other material facts, and third, that they were made in ignorance of the law, which it was the defendant's duty to communicate.

If the executors have received funds, which he, who appointed them as agent, directed them *not to receive*; funds which their answer and the proofs show are still in their hands in their *fiduciary* capacity; taken and held in opposition to the expressed order of testator, courts of conscience should not permit a plea which amounts to an

outrage upon their principal's solemn will—the most sacred of writings and appointments, and we have grave doubt of the power of an agent to set up a mere plea of knowledge in payment, when its very receipt conflicts with the solemn duty of one holding an appointment coupled with denial of right to receive it and as against a *cestui que trust;* a plea of trustees' own act which is in itself a breach of trust.

In other words, a legacy can only be lost by renunciation and executors cannot plead estoppel by any act which places the fund in their hands, charged with a duty respecting it. They take it with the burden cast by the will—their law—and can acquire no rights not given by the will or manifested by the payor.

The executors have no personal rights to the fund, and holding officially, they must hold under the will which commanded them not to take at all.

IV.

IGNORANCE OF CLAUSE 7.

If we except the letter of September 8, 1883, (Rec., 79) written but four days before the $11,516 was sent, wherein complainant notifies Alden that he will contest James's will, as it was testator's desire that it should be destroyed, there is nothing in the case except Alden's evidence indicating however slightly that Robert knew of clause 7 until three to six days after the money had been paid.

Governor Waterman explains how that letter came to be written (Rec., 99) showing that six months before testator's death he and Robert were together at the mines in California and on their return home to San Bernardino,

seventy-five miles, by team, James talked of making a will. Robert asked if he had ever made one, and James said he had, but should destroy it and make another; that in San Bernardino he went to complainant's lawyer twice for that purpose and once in San Diego. He a second time spoke of destroying the old and making a new one. After James's death Robert learned that the old will was the only one and by it the estate was all tied up for twenty-one years; that that was all the Governor knew of the matter when he wrote the letter shown by defendants of September 8th, and we submit it is a very plausible and reasonable explanation. Again, September 27th, Robert shows how earnestly he felt about the will tying up the estate for twenty-one years, to be doled out to him as an inebriate, spendthrift, or weak-minded man.

Alden's evidence (Rec., 73) is that in August, 1883, John C. Waterman, who died in October, 1883, (Rec., 77) told him he was in correspondence with Robert and had given (sent) him a copy of the will, also, "I under-"stood from a letter which is dated the same as Exhibit "A, and from other correspondence, one letter received "on the same day, that the substance of those letters "showed conclusively that he was conversant of all con-"ditions of the will (Rec., 73). I refer to letter of the "(September) 8th, not offered in evidence."

The only theory upon which Alden's evidence, on page 73, obtains any standing is the charge in the bill that he had wrongfully and in bad faith neglected to advise complainant of the contents of the will prior to payment.

As no evidence was introduced by complainant showing bad faith in this regard and as there is no law requiring executors to send copies to *cestuis que trust*, the tes-

timony cannot be received to exonerate them, for the bill is not evidence.

As the evidence is not admissible on that ground, it must fall, as it is clearly inadmissible otherwise. Neither Robert nor John could contradict it. Evidence as to statements of one not a party, and not made in presence of a party is inadmissible. *Kent* v. *Mason*, 79 Ill., 540.

Now take the evidence on page 73. It is only a *conclusion* of Alden's that he testifies to. He does not give the contents of the letter dated September 8, 1883, nor even purport to give its substance, distinctively, nor does he state who it was from, but takes that letter and "other "correspondence" (when written, or who by, does not appear) and says that the substance of *those* letters conclusively showed that Robert knew the will.

Where a witness in his deposition testifies to mere conjectures and suppositions, it is error to admit such evidence when objected to. *Menifee* v. *Higgins*, 57 Ill., 50.

On the taking "counsel for complainant objected to any "suppositions or inferences from letters not produced or "letters produced." If it be claimed that this letter of the 8th was written by Robert, the court is asked to believe he wrote two the same day, one of which is produced, and that produced shows complainant did not consider the will valid, and gives the reason, *i. e.*, because James said "it should be destroyed." Why complainant wanted it destroyed has been explained; it tied the estate up for twenty-one years, which fact was all Robert knew.

But had he known of clause 7 even, it is evident at that time complainant was bent on contesting and destroying the will; evident he did not think it determined his rights.

If the money therefore was paid thinking so much due, it may be recovered. 1 Bacon, Abr., 410.

Alden himself even after receiving the payment understood Robert to deny the validity of the will, for September 18th he acknowledges the letter of September 8th, making no mention of any other letter of that date, saying, (Rec., 87): "I would be glad to listen to your re-
"quest and defer action in the matter of probating the will,
"but the heirs will not consent to any further delays what-
"ever. I have consulted Judge Kellum, and other good
"attorneys, and they all say that there is no good reason
"for delay; that anything *your brother James said to you*
"*about having the will now in question destroyed, etc.*, does
"not cut any figure under our statutes; that whatever you
"or others might decide to do towards having the will an-
"nulled, would have to be done in a court of chancery,
"and could be done just as well after the will had been
"admitted to probate as before." On July 26, preceding, Alden (Rec., 86), wrote Robert that James' will drawn two or three weeks before his death had never been executed, thus showing Robert that to his latest days James, fixed purpose was to make a new will.

But Alden's fixed purpose is to defeat Robert. July 21, 1887, Alden wrote Robert concerning a suit Robert and other legatees had begun against Alden, saying: "it
"being *understood* and *said* that *you* are the *prime mover*
"in the whole matter, charging the executors and trust-
"ees of this estate with all manner of derelictions, etc.,
"etc., asking that we be *punished* and *removed* from of-
"fice * * * when it comes to kicking a fellow out
"(if that is what is being attempted) then I object most
"*strenuously*, and will fight it to the bitter end."

Complainant testifies that six months before payment,

he left directions at Waterman, California, seventy-five miles from his residence, to pay as fast as possible; that it was pursuant thereto that payment was made *without his knowledge;* (Rec., 100), that he did not know of clause 7 until three to six days after payment; that as soon as he did learn of it he consulted his lawyer at San Bernardino; that he wrote Alden (September 23) that by the will his three-fourths of the debt need not have been paid, "therefore "I shall claim that to be repaid to me on all notes paid "since my brother's death; that is, if we have to abide "by the will of 1870" (Rec., 80), and again four days later. (Rec., 81.) "Don't you think I can hold my "share of the money, three-fourths, paid since brother's "death by Waterman & Porter. Write me what you "think."

Here we see that this matter was so impressed on his mind shortly after payment, and that within four days he wrote twice about getting the money back, while there is no allusion to clause 7 in any previous correspondence, and no letter in evidence *referring to any letter not in evidence.*

Concerning Alden's testimony about letter of September 8th, and other correspondence, Governor Waterman testifies (Rec., 103): "I was not conversant with the "provisions of the will in question prior to September "18, 1883, and could not have written any letter from "which it could be inferred that I was so conversant. I "did not know the contents of the will, and especially "* * * clause 7 until I received a copy of the will "from brother John on or about September 18, 1883."

V.

SUBSEQUENT RATIFICATION.

But it will be claimed that the subsequent payment of $445 balance (Rec., 65), with knowledge estops complainant. True, Governor Waterman then knew the will, but not of the second payment.

He says (Rec., 53); "I had given my son, who was "our general book-keeper and secretary, general direc- "tions that when there was a surplus bank account over "and above the running expenses of the mill, to send the "same to *my brother, J. S. Waterman, but I did not give* "*him any specific instructions in regard to these particular* "*payments.*"

These instructions were in testator's life-time, and, of course, in ignorance of clause 7. September 23, 1883, complainant wrote Alden (Rec., 80), "all the notes due my brother from Waterman & Porter are paid." Alden writes Robert several letters afterwards, all addressed to San Bernardino, but in none of them does he question the latter's statement, or pretend there is anything further due. Bobert, convinced that everything is paid, has no need to write instructions to his son, who was at Waterman, California. His son, so far as we know, was never advised of clause 7. In the letter of first remittance the son says if there is any error in figuring he will be happy to correct it. (Rec., 80.) The acknowledgment is sent to Waterman, California (Rec., 62), and Alden says, "mat- "ters are not in shape so that I can send your notes now, "or even say that the amount sent is correct, but will "make transfer credit for the money, and *as soon as pos-* "*sible* have the interest figured, and notes canceled and "returned, if fully paid, *as you say.*"

It was not until November 20th that Alden found it "possible" to reply further; then he called attention to an error of $120 on interest (Rec., 64), and enclosed an account for $389.05, saying, doubtless, there was an offset. This letter also was sent to Waterman, California. The son naturally remits pursuant to original instructions, for *none other were ever given.*

The proofs are, therefore, that the first payment was made without Robert's knowledge, and in ignorance of clause 7, and the second while Robert supposed, as did the son, when the first was made, that the whole debt was extinguished.

VI.

PAYMENTS WERE IN IGNORANCE OF MATERIAL FACTS.

Governor Waterman testifies (Rec., 55), to giving *his individual* agreement to convey to testator on demand 24/100 of certain mines.

He says (Rec., 55): "The then estimated value of the "property embraced in said agreement was about a mil- "lion of dollars. This agreement was given as security "for the payment to said James S. Waterman for any ad- "vances that might be made by him for the development "thereof. There was no defeasance clause, in writing, "and I was fearful that I might have trouble in regard to "it if the money was not paid before a demand for a deed, "and I had directed my son, James S. Waterman, (2d) to "pay the notes given to James S. Waterman for advances "as fast as possible on account of serious apprehension "that great loss might result from delays."

The stipulation of counsel (Rec, 67) shows the above

agreement had, without complainant's knowledge, been assigned to the wife of testator. Here was an important fact that was withheld from complainant. The executors never held the collateral. Hence it was a payment under a species of duress and a serious apprehension of loss.

Money paid may be recovered, if it "clearly appear "that payment was made in consequence of * * * "supposing something to have taken place which turns "out otherwise than he supposed." 2d Saunders Pl. & Ev., 394.

VII.

PAYMENT IN IGNORANCE OF LEGAL RIGHTS.

But assuming the last payment made, with knowledge, the unquestioned facts are that September 27, 1883, Robert wrote Alden: "Don't you think I can hold my share "of the money, three-fourths, paid since brother's death? "Write me what you think." (Rec., 51.)

To which Alden answered, October 4, 1883. (Rec., 51): "Will say briefly that the attorneys here say that "under the will the only obligations (notes, etc.,) against "the brothers of the deceased which are to be canceled, "must be simply personal debts; therefore, debts due from "any company or firm of which a brother may have "been a member, cannot be discharged except upon pay-"ment in full. Expecting to meet you in a short time, "when we can talk matters over more freely, I remain," etc.

Complainant testifies (Rec., 52): "I went to Sycamore, "Ill., in October, 1883, and there had a long conversation "with Mr. Alden with reference to the subject-matter of "this suit, where again he assured me that I was holden

"for the amount; that he had counseled with learned at-
"torneys, and all decided that I was holden for the
"amount. Mr. Alden seemed quite desirous of repaying
"me the amount I had paid, and said that he would be
"glad to do so if the *laws of Illinois* would permit."
* * * "I did not know the laws of Illinois touching
"my liability to pay notes and accounts * * * when
"such payments were made, having reference to clause 7."

VIII.

IGNORANCE OF LAW PREVENTS ESTOPPEL.

This brings us to the discussion of very interesting questions, for the general rule, *ignorantia legis non excusat* being conceded, we purpose to show its inapplicability. Mistakes of law coupled with misrepresentations of law or mistakes of fact, though quite trivial, take the case out of the general rule, and there were both in this case; moreover, mistakes of law are relievable where it is against good conscience that the holder should retain. The civil writers were much divided on the question of relief from mistakes of law pure and simple; some urging that it was impossible that all persons should be cognizant of the law, and that in most of the cases of mistake, men were more likely to know the facts than the law, no less important; while others contended that on no other theory can governments be sustained, and were it otherwise courts would be powerless to prove knowledge, and thus all deals that turned out unfair would be overturned. Out of this Roman divergence sprung up the rule in France and other Latin jurisdictions, affording relief from mistakes of law, and the counter English idea which now generally prevails in this country, but which has been modified to do justice in spite of the rule.

Thus, where one took a lease of his own property from mutual mistake of his legal rights, the court in *Cooper* v. *Phibbs*, L. R., 2 App. Ca. 149, gave relief.

Where one bought an estate that in fact was his, the purchase money was ordered refunded.

Bingham v. *Bingham*, 1 Ves., 126.

So where one brother conveyed to another under the mistaken idea that title could not ascend, relief was decreed.

Lansdowne v. *Lansdowne*, Mosely, 364.

Where a sister released her rights, the release was set aside.

Ramsden v. *Hylton*, 2 Ves., 304.

Where a mother settled with a daughter who intended to take her full share under will, a decree for the difference was entered.

Cocking v. *Pratt*, 1 Ves. Sr., 400.

An election to take £10,000 without knowing of right to demand an accounting before electing was relieved against.

Pusey v. *Debouvrie*, 3 P. Wm. 315.

A forgave the debt of B Company to hold C; B and C's agreement was set aside as *ultra vires*, and debt of B restored.

Re Saxon Life Assn. Society, 2 J. & H., 408.

So where for years one had received less than his legal rights, and settled; held entitled to difference.

Davis v. *Morier*, 2 Call., 303.

Liability assumed by heir under mistaken idea that shares were realty and not devised.

Held not bound. *Broughton* v. *Hutt*, 3 DeG. & J. 501.

Wife's note invalid, because given in ignorance of *non*-liability.

Coward v. *Hughes*, 1 K. & J. 443.

In the United States the exceptions are quite as pronounced.

Cammack v. *Lewis*, 15 Wall., 243.
Wheeler v. *Smith*, 9 How., 55.
Snell v. *Atlantic F. & M. Ins. Co.*, 98 U. S., 85.
Hunt v. *Rousmanier*, 8 Wheat., 174.

The courts of Maryland, New York, Texas, Alabama, Connecticut, Tennesse and South Carolina have held that where the legal rights are confessedly doubtful and such as ignorance may well be supposed to exist, a person acting under a misapprehension of the law will not forfeit any legal rights by reason of such mistake. Kerr on Frauds and Mistakes, 399.

Other states might have been included; thus, in New Jersey, *Skillman* v. *Teeple*, Saxton, 232, one gave up and released securities in ignorance of her rights and by advice contained in letter of one pretending to conserve her interests. Held, even if intending no wrong, it was no excuse. She misapprehended her rights.

The case of *Northrop, Executor*, v. *Graves*, 19 Ct., 548, is a most able and instructive review of the authorities, English and American. An executor had paid $500 to to one thought to be entitled to it. On discovering his misconstruction he sued to recover and succeeded.

For payment to work an estoppel it must be construed as an acquiescence, "but in order that the *cestuis que* "*trust* may be bound by their acquiescence" in anything

affecting their interests "there must be on their part full "knowledge of all the facts and circumstances, and the "trustee must be free from all suspicion of misrepresenta- "tion," (Perry on Trusts, Sec. 467,) and the *cestuis que trust* must be apprised of the effect and of their *legal rights.*

Munch v. *Cockerell*, 5 Myl. & Cr., 178.
Montfort v. *Cadagan*, 17 Ves., 489.
Burrows v. *Walls*, 5 De G., M. & G., 233.
Underwood v. *Stevens*, 1 Mer., 712.
Walker v. *Symonds*, 3 Swanst., 1.

IX.

ABUSE OF TRUST—MUTUAL MISTAKE—ESSENTIALS OF A RENUNCIATION—DUTIES OF TRUSTEE.

Lord ELLENBOROUGH, in *Taylor* v. *Plummer*, 3 M. & S., 574, laid down the rule that "an abuse of trust can "confer no rights on the party abusing it, nor on those "who claim in privity with him," and Perry on Trusts, Sec. 835, says "it may be added that an abuse of trust "can deprive the *cestui que trust* of no rights so long as "the property or its proceeds can be traced and identified "in the hands of those who have full knowledge of all "the equities."

In Ohio, a widow misconstrued her rights to land under a will. The defendants, who were executors, set up agreement to pay her $200 per year, and on remarriage $1,000 in full of all claim. She received $200 per annum and on marriage the $1,000 was secured to her, all of which was precisely what she was entitled to under the construction all put upon the will, though the defendant denied advising as to construction. Held, if denial

proved, it would not avail against rights now claimed as not considered as existing, and hence not parted with.

Bigclow v. *Barr*, 4 Ohio, 358.

To enable executor to represent that there is no legacy, and when discovered, to say it was renounced on former understanding, is to permit the representatives of the dead and trustees of the living to commit a fraud on both.

Upon a question as to whether beneficiaries under the will had ratified unlawful investment by executors of estate funds, the New York court says (p. 553): "To "establish a ratification by a *c. q. t.* the fact must not "only be clearly proved, but it must be shown that the "ratification was made with a full knowledge of all the "material particulars and circumstances, and also in a "case like the present, that the *c. q. t.* was fully ap- "prised of the effect of the acts ratified, and of his or "her legal rights in the matter. Confirmation and ratifi- "cation imply to legal minds, knowledge of a defect in "the act to be confirmed, and of the right to reject or "ratify it. The *c. q. t.*, must therefore not only have "been acquainted with the facts, but apprised of the law, "how these facts would be dealt with by a court of equity. "All that is implied in the act of ratification, when set up "in equity by a trustee against his *c. q. t.*, must be proved, "and will not be assumed. The maxim *ignorantia legis* "*excusat neminem* cannot be invoked in such a case. The "*c. q. t.* must be shown to have been apprised of his "legal rights. *Cumberland Coal Co.* v. *Sherman*, 20 "Md. R., 151; S. C., 30 Barb., 575; *Lanmott* v. *Bowley*, "6 H. & J., 526."

Adair v. *Brimmer*, 74 N. Y. R., 539.

"All agreements or contracts between trustee and *ces-*

"*tuis que trust* are looked upon with suspicion by the "court, and are closely scrutinized; therefore, in order "that the release, confirmation, waiver or acquiescence "may have any effect, the *cestuis que trust* must have full "knowledge of all the facts and circumstances of the case; "he must also know the law, and what his rights are, and "how they would be dealt with by the court."

Perry on Trusts, Sec. 851.

"Under no circumstances can a trustee claim or set up "a claim to trust property adverse to the *cestuis que trust*." Even if he suspects fraud in the appointment, he must assume the validity of the instrument under which he acts, "nor can he use his influence to defeat the purposes of "the trust as declared by the creator of it."

Perry on Trusts, Sec. 433.

The relations and privity between trustee and *cestuis que trust* are such that the possession of the one is the possession of the other, and there can be no adverse claim or possession during the continuance of the relation. No claim should be made through a breach of the trust. This applies to executors and all holding fiduciary relations.

Perry, 863.

Relief is decreed if ignorance of the law be superinduced by the other party.

Sparks v. *White*, 7 Humph., 86.

In *Burrows* v. *Walls*, 5 DeG. M., & G., 233, the court held it to be the duty of all three executors to explain to the *cestuis que trust* what the rights were, and though one had controlled the funds for years and was alone looked to in the matter, and there were letters to that effect from

the *cestuis que trust* the court held there was no acquiescence and all were holden.

"Where acquiescence is relied upon it is essential that "the person who acquiesces must know exactly the na- "ture of the thing to which his acquiescence is supposed "to be given."

Strange v. *Fooks*, 4 Giff., 413.

In *McCarthy* v. *DeCaix*, 2 R. & M., 614, a proceeding to recover annuity, the defense was a renunciation of all claims, and the question was, was he aware of his legal rights, which depended upon the effect in England of a Danish divorce?

Husband, by letter from Santa Cruz, assuming the divorce good in England renounced all claim to wife's estate. It having been decided otherwise, it was held the renunciation invalid, as being made in ignorance of a material fact.

Administrator and widow in Georgia mutually mistook the law and he paid $1,000 to each of her five children in her presence and without objection, paying her also $1,000 as her share at the same time.

The question was as to how far her acquiescence bound her. The evidence showed that all parties misconceived the law. The court said: "This is not the case of a "contract, where both parties stand upon their own judg- "ment, and where no special duty is cast upon either. "Bagley is a trustee; an officer appointed by law to per- "form a specified duty, to wit: to administer the estate "according to law, and the rules prescribing his duty are "the law of the land. He had a duty to perform; if he "failed, however ignorant or mistaken he may be he can-

"not excuse himself. He has a mere ministerial duty to "perform in *paying out* this estate, and if he pay any "portion of it to one not entitled, he is responsible to those "entitled. Mrs. Davis had no *duty* in the premises. She "was under no *obligation* to keep Bagley informed as to "the law; and her failure to instruct him as to his duties "is no breach of any duty on her part. There is no "pretense of any fraud or concealment by her. * * * "We do not think she is estopped. Estoppel always im- "plies that the person has by his act, misled the other. "(Code, Sec. 3,700.) It was not Mrs. Davis' duty to "instruct Bagley as to the law. It was Bagley's duty to "obey the law. He was the actor, sworn and bonded, "authorized to take counsel and charge the estate for it, "and we can see no reason for excusing him from the "performance of his duty, because Mrs. Davis, who was "not bound to set him right, stood by and in her own "ignorance permitted him to go wrong."

Davis v. *Bagley*, 40 Ga., 181.

X.

PAYMENT ONLY RESOLVES THE GIFT INTO MONEY.

The obligation of the executors was at least equal to that of the debtor. Their position was fiduciary. They had no discretion. They could not change their instructions. Now, assuming plaintiff meant to pay the debt, it must be because he did not understand he was a legatee of it, and even his letters, after payment of first draft, show he supposed it gave him only three-quarters. Renunciation of the legacy, therefore, cannot be predicated

upon an act so strikingly opposed as payment. Voluntary payment, consequently, but changes the form of the gift in executor's hand with legatee's consent. It is payment to a trustee to receive and pay over in proper time in execution of the trust.

Happily there is no hardship in decreeing payment out of testator's estate of half a million dollars.

WILLIAM R. PLUM,
Counsel for Appellant.

Office Supreme Court U. S.
FILED.
JAN 5 1891
JAMES H. McKENNEY

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1890.

ROBERT W. WATERMAN,
Appellant,
vs.
PHILANDER M. ALDEN AND J. S. ROBINSON, INDIVIDUALLY AND AS EXECUTORS OF JAMES S. WATERMAN, DECEASED,
Appellees.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF AND ARGUMENT OF APPELLEES.

JOHN P. WILSON,
SOLICITOR FOR APPELLEES.

IN THE

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Appeal from the Circuit Court of the United States for the Northern District of Illinois.

STATEMENT OF THE CASE.

Robert W. Waterman who was a brother of Jas. S. Waterman, deceased, filed his bill in the Circuit court to recover from appellees, as executors of James S. Waterman, about $12,000, paid by the firm of Waterman & Porter, of which he was a member, to appellees, in satisfaction of partnership debts due from said firm to James S. Waterman at the date of his death. The claim set up in the bill is that said firm debts were given to appellant as a legacy under the seventh clause of the will of Jas. S. Waterman which reads as follows:

"I desire and direct that any and all notes, bills, ac-
"counts, agreements or other evidences of indebtedness
"against any of my said brothers or sisters held by me
"at the time of my decease be canceled by my said exec-
"utors and delivered up to the maker or makers thereof
"without payment of the same or any part thereof, except
"two notes I hold against John C. Waterman—one for
"$8,000, dated August 10th, 1870, and due Jan'y 1,
"1871, and one for $4,600, dated Nov. 28, 1870,
"and due six months after date, and both secured by
"trust deed upon lands in Johnson county, State of Mis-
"souri—which notes I desire and direct to be collected and
"equally divided between my said brothers and sisters,
"the child or children of a deceased brother or sister to
"take the same share the father or mother would have
"taken if living."

The will was made in 1870, and the firm of Waterman & Porter was not formed until about ten years thereafter, and the indebtedness of the firm to James S. Waterman was for advances made to the firm upon security by Mr. J. S. Waterman, in the year 1881. The case was heard in the Circuit court by Mr. Chief Justice Fuller, who held that it was not the intention of the testator that the indebtedness of Waterman & Porter should be brought within article 7 of his will, and the bill was dismissed. This appeal is prosecuted to reverse the decree entered dismissing the bill.

ARGUMENT.

The controlling principle in the construction of wills is to ascertain and carry out the intention of the testator. All rules laid down for the construction of wills are to be used merely as helps in reaching the intention of the testator. The controlling question in this case is, did the testator intend, by his will, to give to his brother Robert the indebtedness due him from the firm of Waterman & Porter.

The testator by his will disposed of his estate as follows:

1st. He directed that all of his debts should be paid.

2d. He gave one-third of his estate to his wife.

3d. He gave a bequest of $5,000 to a trustee for Nellie Farnhdon.

"4th. I give, bequeath and devise all the rest, "residue and remainder of my estate, both real and per- "sonal, to the said Philander M. Alden and George S. "Robinson, of Sycamore, Illinois, the executors of this "my last will and testament, hereinafter nominated and "appointed, in trust for the use and benefit of my said "brothers and sisters, to wit: John C. Waterman, "Charles Waterman, Robert W. Waterman, Charlotte "Waterman, Mary Wells and Sarah E. Waterman, to have, "hold, manage and control the same for such purpose for "and during the term of twenty-one years from and after "the date of my decease, and that during the continuance of "said trust estate, as aforesaid, to receive, collect, and pay "over to my said brothers and sisters above named the net

"income and profits thereof in equal portions to each an-
"nually the child or children of a deceased brother or sister
"to take the same portion the father or mother would have
"taken if living; and at the expiration of said twenty-one
"years after my decease, I give, bequeath, and devise to
"my said brothers and sisters, their heirs and assigns,
"forever, the said rest, residue, and remainder of my es-
"tate, both real and personal, to be equally divided be-
"tween them, share and share alike, the child or chil-
"dren of any deceased brother or sister to take the same
"share the father or mother would have taken if living;
"and in case of the death of any of my said brothers or
"sisters leaving no issue the share such brother or sis-
"ter would have taken, if living, to be equally divided
"among my surviving brothers and sisters."

5th. The testator made certain bequests in the event he should survive his wife, which was not the case.

6th. By the sixth clause he gave certain powers to his executors.

7th. The seventh clause in the will is the one the construction of which is in dispute, and which has already been quoted.

8th. The eighth clause of the will relates to the management of his estate.

9th. The ninth clause nominates appellees to be his executors.

At the date of the execution of the will in 1870, the testator had no children, nor did he leave any issue him surviving at the date of his death. More than ten years after the date of the will, and in the year 1881, appellant entered into a copartnership with one J. L. Porter, for the purpose of developing mining property. Shortly after the formation

of the copartnership an arrangement was made with the testator for advances, in regard to which appellant testifies as follows:

"I have made an agreement with my brother as se-
"curity for the payment of any advances which he might
"make to me and Mr. Porter for the working of the
"mine on May 14, 1881, of which the following is a
"copy:

"SAN BERNARDINO, May 14, 1881.

"For and in consideration of one dollar to me in hand
"paid, the receipt whereof is hereby acknowledged, I
"hereby agree that at any time within twelve months
"from this date upon demand of J. S. Waterman or his heirs,
"administrators, or assigns, I will execute to him a good
"and sufficient deed of conveyance to an undivided
"twenty-four one hundreths (24/100) of the following
"mines, known as the Alpha, Omega, Silver Glance, and
"Front, each being six hundred feet wide by fifteen hun-
"dred feet long, and the same interest in all lands that
"may be located or has been located for the development
"of the above mines, with such machinery and improve-
"ments as is to be placed upon the same, all subject to
"the same proportion of expenses which is to be paid out
"of development of the above property, all situated near
"the Grapevine, in the county of San Bernardino, State
"of California.

"(Signed) R. W. WATERMAN."

"The then estimated value of the property embraced
"in said agreement was about a million of dollars. This
"agreement was given as security for the payment to
"said James S. Waterman for any advances that might
"be made by him for the development thereof. There
"was no defeasance clause in writing, and I was fearful

"that I might have trouble in regard to it if the money "was not paid before a demand for a deed, and I had in- "structed my son, James S. Waterman, to pay the notes "given to James S. Waterman for advances as fast as "possible, on account of serious apprehension that great "loss might result from delays, and being at the time in "ignorance of clause seven of James S. Waterman's will." (Rec., p. 27.)

Appellant further testified:

"Waterman & Porter were indebted to my deceased "brother, S. Waterman, between twenty-five and thirty "thousand dollars; the indebtedness of Waterman & Por- "ter to my deceased brother was past due, and a stand- "ing order given to my son, James S. Waterman was that "whenever there was any money on hand over and above "what was necessary for running expenses of the mine, "to remit it to my brother." (Rec., p. 49.)

At the time of the death of James S. Waterman the indebtedness of Waterman & Porter had been reduced by payments, leaving a balance then due of between $11,000 and $12,000. For advances made by the deceased to Waterman & Porter the firm notes were given, the last of which bears date November 22, 1881, and was due four months after date. The other notes given for these advances appear upon pages 9 and 10 of the printed record, and all fell due in four months after their respective dates, with the exception of one note for $7,500, dated August 14, 1881, which matured in six months after date. After the death of James S. Waterman, the executors under the provisions of article 7 of the will surrendered to Robert W. Waterman, his individual notes to the amount of twelve or fifteen thousand dollars. (Rec., 34.) James S. Waterman died on the 19th day of July,

1883. Appellant, by his letter, dated September 8th, gave formal notice to Mr. Alden that he would contest the will. On the 12th day of September, 1883, the firm of Waterman & Porter, by J. S. Waterman, sent a draft from San Francisco for $11,504.51 to pay the indebtedness of the firm to the estate of James S. Waterman. At this date the will had not been probated, and no request had been made for the payment of the indebtedness. On the 23d day of September, 1883, appellant wrote the following letter to Mr. Alden, one of the executors:

"My Dear Sir: All the notes due my bro. from "Waterman & Porter are paid; yet, by the will of my "bro., I need not have paid my part—'¾.' Therefore, "I shall claim that, to be repaid to me on all of our notes "paid since my bro.'s death—that is, if we have to abide "by the will of 1870. I hope to be with you in Oct., "and, if Judge Robinson does not qualify as one of the "ex., I claim the place, as my bro. expresses himself that "I should do so.

"Yours truly,

"R. W. Waterman."

In a postscript to a letter written to Mr. Alden on the 27th day of September, 1883, appellant wrote:

"Don't you think I can hold my share of the money, "¾ pd. since brother's death by Waterman & Porter? "Write me what you think. Judge Willis, my lawyer, "says I can."

To which Mr. Alden replied as follows:

"Sycamore, Ill., Oct., 4, 1883.

"*R. W. Waterman, Esq., San Bernardino, Cal.*

"Dear Sir: Yours of 27th ult. rec'd, and noted "and will say briefly that the att'ys here say that

"under the will the only obligations (notes, &c.) "against the brothers of the deceased which are to be "canceled, must be simply personal debts; therefore, "debts due from any Co. or firm of which a brother "may have been a member, cannot be discharged except "upon payment in full. Expecting to meet you in a short "time when we can talk matters over more freely, I re- "main,

"Yours very truly,

"P. M. ALDEN, *Ex'r.*"

Upon an examination of the notes and accounts, it was found that the amount sent on September 12th, was not sufficient to fully discharge the indebtedness due from Waterman & Porter to the estate of James S. Waterman, and on the 5th day of February, 1884, Waterman & Porter sent a draft for $445 in settlement of the balance due. (Rec., 30, 31.) The drafts sent to the executors of the estate of James S. Waterman in satisfaction of the indebtedness due to the estate from the firm of Waterman & Porter, were purchased with funds belonging to the partnership. Appellant contends that by the seventh clause of his will, the testator made a gift or a bequest to him of the indebtedness due to the testator from the firm of Waterman & Porter, and that therefore appellant is entitled to collect from the executors, the amount of said firm indebtedness paid to said executors. Appellees contend that the testator by his will intended to make an equal distribution of his residuary estate between his brothers and sisters, except in so far as this distribution might be modified by the release to them respectively of any individual indebtedness which might be due from them to him at the date of his death, with the exception of certain secured indebtedness specified in the will, owing by his

brother John C. Waterman. It does not appear that either of his brothers or sisters were connected with any other persons in business at the date of the will, or that there was any other than individual debts due him from his brothers and sisters at the date thereof. The advances in question were made for a limited time to a copartnership for the development of a specific business enterprise of great magnitude and were large in amount, and for their repayment the testator required and received security. Nothing was further from the intention of the testator than to donate these advances either to the firm or to his brother. Appellant feared that the testator would not even consent to have back the advances but would insist on retaining the interest in the mine which had been conveyed to him by way of security.

But it is contended by counsel, that the partnership debt due from Waterman & Porter fall within the language used by the testator in the seventh clause of his will and are therefore controlled by and within the provisions of said section. In support of this contention, counsel refers to the statutes of California and Illinois, making joint obligations several as well as joint, and contends that it therefore follows that the firm notes held by James S. Waterman at the date of his death were the individual notes of appellant, and that Porter was a mere surety. If counsel's contention in regard to these statutes was correct, it would be just as true to say that the firm notes held by James S. Waterman at the date of his death were the individual notes of Porter and to treat Waterman as a surety, and looking at this indebtedness from that standpoint that it was not the intention of the testator to give to his brother the individual notes of Mr. Porter held by the testator at the date of his death. But the

notes in question were neither the individual notes of Mr. Waterman or Mr. Porter. They were co-partnership notes given for a firm indebtedness.

It is at least doubtful whether the provisions of the statutes of California and Illinois making joint obligations several as well as joint, have any application to partnership obligations. Neither of the cases cited in the brief of counsel for appellant holds that said section relates to partnership obligations. The provision of the statutes of the State of Illinois referred to by counsel was first enacted in the year 1821, and has been in force in said state ever since. It has been decided by the Supreme court of Illinois that a judgment against one of several parties to a joint and several obligation is no bar to a suit against the other parties to such obligation. It has also been decided that a judgment against one partner on a partnership obligation is a bar to a suit against the other partners. Hence it follows under these decisions that a partnership obligation is not a joint and several obligation. In the case of the *People* v. *Harrison*, 82 Ill., 84, the Supreme court say:

"It may be regarded as well settled, that a recovery "against one of several persons, who are jointly liable "for the payment of a debt or the discharge of a legal "liability, releases the others, and forms a complete bar "to a recovery at law against them. *Wann* v. *McNulty*, "2 Gilm., 355; *Thompson* v. *Emmert*, 15 Ill., 415; *Moore* "v. *Rogers*, 19 Ill., 347; *Mitchell* v. *Brewster*, 28 Ill., "163.

"But the question presented by this record arises, not "upon a joint contract, but the obligation is both joint "and several, and hence the rule in relation to a joint un- "dertaking does not apply."

In the case of *Thompson* v. *Emmert*, 15 Ill., 415, a suit was brought against two partners upon partnership notes; a judgment had been obtained against two of the partners, and the question was whether the third partner could plead said judgment in bar to a suit against him upon the partnership obligation, and the court said:

"The rule is, that if a judgment be obtained against one "partner or joint contractor, the creditor cannot maintain "a second action against the other partner or joint con- "tractor. The judgment operates as an extinguishment "of the cause of action, and a discharge of the other part- "ner or joint contractor from all liability to the credit- "or. The law may be otherwise in reference to a judg- "ment against one, upon a joint and several cause of ac- "tion."

The same rule of law was held in the case of *Wann* v. *McNulty*, 2 Gilm., 355, which was a case of a suit brought upon a partnership obligation.

In the case of *Coates* v. *Preston*, 105 Ill., 470, the question arose as to whether the debt of a firm could be set off against the claim of one of the individual partners. It was contended that the section of the Illinois statute making all joint obligations joint and several made the partnership debt a several obligation of each of the partners, and that, therefore, it could be offset against the individual debt of one of the partners. The court say:

"It is a misapprehension to suppose section 3, chapter "76, Revised Statutes, 1874, changes the practice in this "respect. Even if that section of the statute has any "application to partnership contracts, *which is not conced-* "*ed*, still, the debt or claim offered to be set off in this "case would not be mutual nor between the parties to the

"action, and therefore under the previous decisions of "this court, it could not be the subject of setoff against "the claim of the individual partner."

In the case of *Mason* v. *Eldred*, 6 Wallace, 231, this court said:

"The plaintiff contends that a copartnership note is "the several obligation of each copartner, as well as the "joint obligation of all, and that a judgment recovered "upon the note against one copartner is not a bar to a "suit upon the same note against another copartner; and "the latter position is insisted upon as the rule of the "common law, independent of the joint debtor act of "Michigan.

"It is true that each copartner is bound for the entire "amount due on copartnership contracts; and that his "obligation is so far several that if he is sued alone, and "does not plead the non-joinder of his copartners, a re-"covery may be had against him for the whole amount "due upon the contract, and a joint judgment against "the copartners may be enforced against the property of "each. But this is a different thing from the liability "which arises from a joint and several contract. There "the contract contains distinct engagements, that of "each contractor individually, and that of all jointly, "and different remedies may be pursued upon each. "The contractors may be sued separately on their "several engagements or together on their joint "undertaking. But in copartnerships there is no such "several liability of the copartners. The copartnerships "are formed for joint purposes. The members under-"take joint enterprises, they assume joint risks, and "they incur in all cases joint liabilities. In all copartner-"nership transactions this common risk and liability ex-

"ists. Therefore it is that in suits upon these transac-
"tions all the copartners must be brought in, except when
"there is some ground of personal release from liability,
"as infancy, or a discharge in bankruptcy; and if not
"brought in, the omission may be pleaded in abatement.
"The plea in abatement avers that the alleged promises,
"upon which the action is brought, were made jointly
"with another, and not with the defendant alone, a plea
"which would be without meaning, if the copartnership
"contract was the several contract of each copartner."

Section 2442 of the stateutes of California provides:

"Every general partner is liable to third persons for
"all the obligations of the partnership, jointly with his
"copartner."

In the case of *Harrison* v. *McCormick*, 69 Cal., 616, a suit was brought against a partnership for failure to comply with its contract. The suit was against McCormick and Lewis, and the contract was made by McCormick, Lewis & Company. The court held that the partners were jointly liable upon the partnership obligations, and that all were necessary parties to the suit.

It has been expressly held in several states that while a partner has a right to give a joint note in transacting the partnership business, that he has no power to give a joint and several obligation.

In the light of the decisions it seems clear that the statutes referred to by counsel were not intended to affect partnership obligations, and that therefore, the firm obligations of Waterman & Porter were not even technically the notes or the obligations of Robert W. Waterman.

But, even if counsel were correct in his contention in relation to the statutes of California and Illinois, it is a rule

in constructing wills "that the words must have their "ordinary popular significance, technical terms excepted, "unless there is something in the context or the subject-"matter to indicate a different use, and this indication "must be clear and unequivocal in order to prevail." 1st Redfield on Wills, 438. In popular language there is a distinction between the indebtedness of an individual and the indebtedness of a firm; in popular language the notes in question would never be spoken of as the notes or indebtedness of Mr. Waterman. They would be spoken of as the notes and the indebtedness of the firm of Waterman & Porter, and not otherwise. The language used in the seventh clause of the will should be construed in the same sense. This construction alone carries out the evident intention of the testator to make an equal distribution of his residuary estate between his brothers and sisters. Under the construction contended for by appellant, appellant was not only entitled to have remitted his share of the firm debt of Waterman & Porter but to collect from Waterman & Porter the entire debt and to appropriate the same to his own use. The fact that Waterman happened to own a three-fourths interest in the firm does not affect the question. The question would be the same if Porter's interest was three-fourths and Waterman's one-fourth, and the question would be the same regardless of the amount of the advances or indebtedness of the firm, which at one time amounted to $30,000. Nothing could be further from the intention of the testator than to have authorized his brother, the appellant, to collect a firm debt due to the testator and appropriate the same to his own use, thereby wholly destroying the equality in the distribution of his estate between his brothers and sisters, which he evidently de-

sired to carry into effect. Appellant himself, after he had examined the will and consulted with his counsel, was not of the opinion that the testator intended to make him a gift of this debt. His only thought was that he might secure a release of his share of the firm's indebtedness under the seventh clause of the will. We think it evident that this indebtedness was paid by the firm with full knowledge. Appellant in his letter of September 27, 1883, written eleven days after the mailing of the draft in satisfaction of the indebtedness, speaks of the payment of the notes due from the firm of Waterman & Porter, and that by the will he need not have paid his part, three-fourths. There is no expression of surprise at the contents of the will, or any suggestion that the payment had been made under a mistake either of law or fact as to the obligation to pay. He was then advised both as to the contents of the will and of his legal rights under the same, but makes no suggestion of any mistake. The payment was undoubtedly deliberately made for the purpose of preventing any claim to an interest in the mines under the instrument delivered by the firm to James S. Waterman, and the balance still remaining due was paid in the following February. Appellees are executors and trustees, having no personal interest in the matter in controversy in this suit. They at no time have desired to do anything further than to discharge their duties as trustees under the will in regard to the matter now in controversy. The controlling question in this case is the intention of the testator, and upon this question we do not think the cases cited by counsel for appellant throw any light.

Respectfully submitted.

JOHN P. WILSON,
Solr. for Appellees.

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CLERK.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1892

EXECUTRIX OF THE WILL OF ROBERT W. WATERMAN, DECEASED,

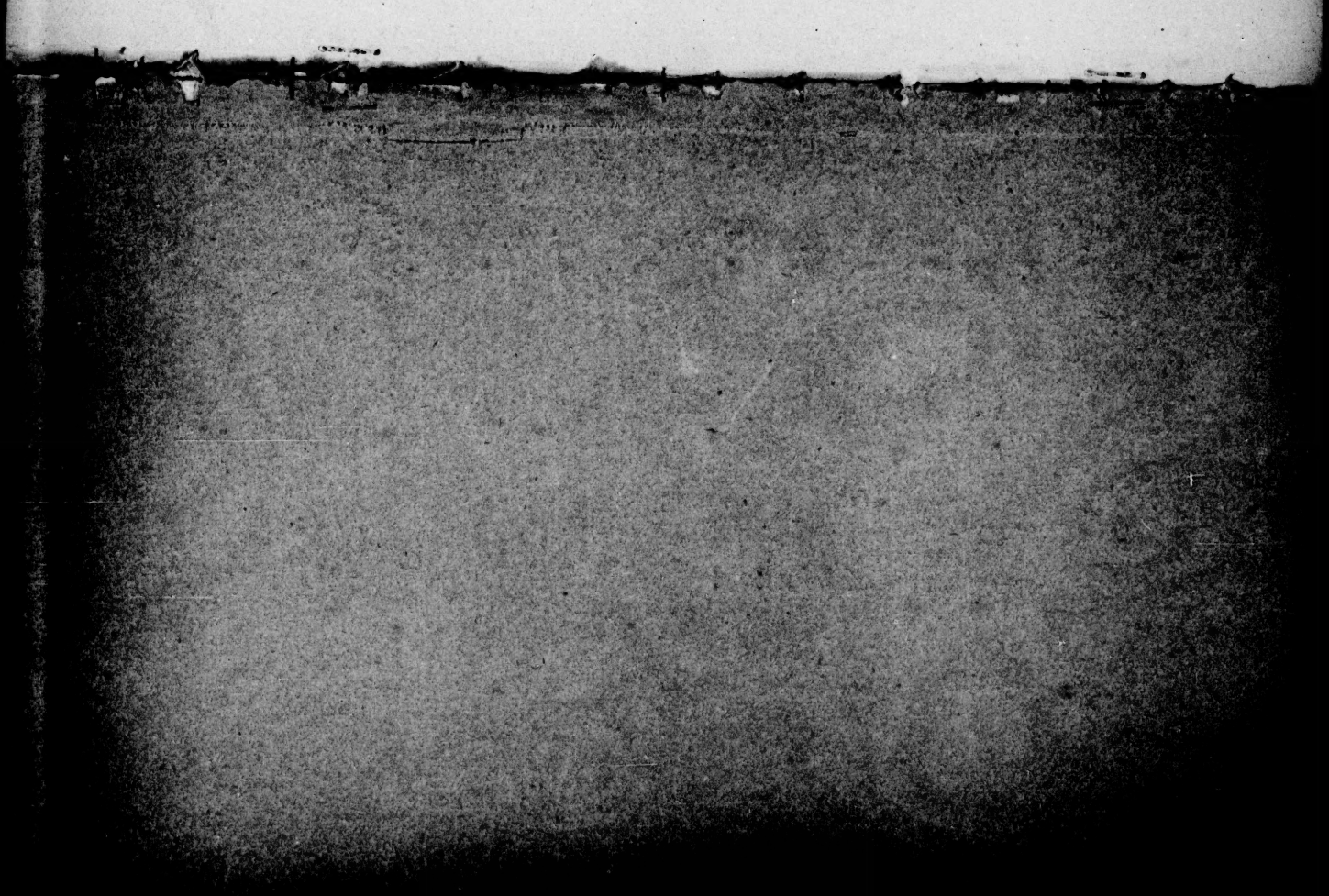
vs.

PHILANDER M. ALDEN AND G. S. ROBINSON, EXECUTORS OF THE WILL OF JAMES S. WATERMAN, DECEASED.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

REPLY FOR APPELLANT.

WM. R. PLUM,
FOR APPELLANT.



IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1891.

EXECUTRIX OF THE WILL OF ROBERT W. WATERMAN, DECEASED,

vs.

PHILANDER M. ALDEN AND G. S. ROBINSON, EXECUTORS OF THE WILL OF JAMES S. WATERMAN, DECEASED.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

REPLY FOR APPELLANT.

The dominating intent in the will of James S. Waterman was, that his executors or personal representatives should have no claim or cause of action of any kind whatever against any brother or sister of his—except John C. Waterman in the specific instance named in said will. Testator was a wealthy man, without children. He expected to have money transactions of one sort or another with his brothers—transactions in which they would become indebted to him. So far as such transactions might involve liability of any sort on the part of any brother to his estate, he meant to be his own executor; he meant that every claim of whatever sort (ex-

cept against John C., in the specific instance mentioned), enforcible in any manner against any brother, should be finally and forever settled by his death in favor of such brother.

This intent is manifested in the seventh clause of the will where speaking of the two notes to John C. Waterman secured on the Missouri land, the testator says: "Which notes I desire and direct *to be collected*." This direction is wholly superfluous, except as indicating the understanding of the testator that no other liability to his estate was to be enforcible against John C. or any other brother or sister.

Again, instead of simply giving as an annuity to his brothers and sisters the income of the fund put in the hands of the executors in trust, the testator directs the said executors "to pay over" to each of the brothers and sisters annually his or her share of the said income. A limitation upon this direction "to pay over" said income as aforesaid, is clearly imposed in the case of John C. Waterman. The executors are not in all events bound "to pay over" to John C., his share of said income. On the contrary they may be bound for a time at least not "to pay over" to him any share of said income. It may be their duty to retain his share of said income in extinguishment of his said debt to the estate. But clearly within the intent of the testator no one of the other brothers or sisters was to owe the estate anything after testator's death; nor could John C. be indebted except in the instance expressly mentioned by the testator. The direction "to pay over" his share of income to each beneficiary indicates the understanding on the part of the testator that at his death no one of said beneficiaries (except John C., in the case named) could be indebted or

liable to the estate in any manner which might make it appropriate and necessary for the executors to set off or credit his portion of the income instead of *paying over* the same.

In other words, when testator gave to appellant "any "and all notes, bills, accounts, agreements, or other evi- "dences of indebtedness, against" appellant "held by "me at the time of my decease," he meant to include in said gift any and every debt or liability which might otherwise in any contingency have made it equitable for the executors to retain as an offset appellant's portion of said income instead of *paying it over* to appellant.

The scope of the words, "any and all notes, bills, ac- "counts, agreements or other evidences of indebtedness "against any of my said brothers or sisters held by me "at the time of my decease," as used by this testator is indicated therefore on the face of this will. They comprehend any debt, liability or obligation in extinguishment of which the share of income appropriate to any beneficiary could in any event have been applied. A debt owed by a brother of the testator jointly with another—a partnership debt—would fall within this category just as certainly as his sole or several debt.

The learned counsel quotes from Redfield: "that the "words (of a will) must have their ordinary popular "significance, unless there is something in the context or "the subject-matter to indicate a different use." As pointed out in the original argument for appellant, section 7 of this will is a gift or legacy and not a release. Proposing to give to each of his brothers and sisters something which such brother or sister may chance to be accountable for to his estate at testator's death, he says in substance, "I give to each of my said brothers and sisters

"'any and all notes, bills, accounts, agreements, or other "evidences of indebtedness against' him or her 'held by "me at the time of my decease.'" Now, as shown above there is "something in the context" of this will which indicates that the testator understood these words to embrace every debt for which any brother (or sister) might be in any way accountable to his estate; every debt which the law would in any event force such brother (or sister) to pay.

Again, permitting this will to speak at the time of the death of the testator, presuming that the testator was satisfied to have his will take effect upon the state of facts as then existent (and this is a conclusive presumption), and understanding that his brothers and sisters were the only natural objects of his bounty, the "ordinary and popular "significance" of the testator's words, "*any and all* notes, "bills, accounts, agreements or other evidences of in-"debtedness against any of my said brothers or sisters "held by me at the time of my decease," includes *every* liability in favor of the estate which could be in any manner enforcible against any brother or sister. When used in a will and under such circumstances as are here shown (barring for the sake of the argument the context indications as already mentioned), these words in "their "ordinary and popular significance" do not limit the bounty of the testator to debts of any particular sort. Said words do not contain in themselves any limitation which would exclude a debt owed by a brother jointly with another; and if the critic who concludes that said words ought to be construed as containing such a limitation, will attend to his own mental processes, he will find as the basis of his reasoning the latent assumption on his part that the testator ought not, in reason and propriety, to have made such a will without such a limitation.

As stated in the original argument for appellant, the rule of construction in wills is, that a bequest in general terms *prima facie* includes everything capable of being comprehended under said general terms, which the testator had power to dispose of. The words of this testator are not only capable of comprehending, but in "their ordinary and popular significance" do comprehend, every debt which the executors could in any event have compelled appellant to pay to the estate; not only so, but the context of the will affords independent and positive assurance that the testator so understood said words.

The construction contended for by counsel for appellees is not the sense of the words in question in "their "ordinary and popular significance." Said construction would impose upon said words a limitation which they do not import, and which, if permissible on the face of the words would be inconsistent with other parts of the same will. Said construction would also contravene the established rule that the words of a bequest must be held to include everything capable of being comprehended thereunder, which the testator had power to dispose of.

The point made by the learned counsel that the debt here in question was owed by appellant jointly with Porter, and not jointly and severally, even if it be sound, is immaterial. Besides, the $7,500 note is by its terms the several debt of this appellant.

But the learned counsel is mistaken.

Assuming that *Mason* v. *Eldred*, 6 Wall., 231, states the true doctrine as to partnership obligations, it would be to refine the letter of the law to the destruction of its spirit, to so construe it as to read, that while Waterman and Porter were jointly liable, yet neither Waterman nor Porter were obligated. If this was so, then the doctrine

of a release of one joint debtor releasing the other could never have obtained, for there can be no personal release where there is no liability. The great distinction between a joint and a several obligation is not that all are liable together, for, though several in terms, if it be one debt, all *may* be joined in suit; but it is, that if joint, one may plead the non-joinder of the others, which he cannot do if several. All partners are therefore individually liable.

This is admirably stated in *Mason* v. *Eldred*, as follows:

"It is true that *each copartner is bound for the entire* "*amount due on copartnership contracts;* and this obliga- "tion is so far *several*, that if he is sued alone, and does "not plead the non-joinder of his copartners, a recovery "may be had against him for the whole amount due upon "the contract, and a *joint judgment* against copartners "may be enforced against the property of *each*."

Consequently though a joint contract, either defendant may plead as an individual either infancy, coverture, discharge in bankruptcy, former recovery, release or any other matter that shows that the cause of suit is not a subsisting one against the pleader. So appellant, if sued on these notes with Porter could have plead the seventh clause of the will in bar. Unless this be so, judgment would be entered, and on execution the whole of it could be collected from Governor Waterman alone.

There is nothing in these debts to prevent Waterman and Porter from dissolving and settling their firm matters at any time prior to payment, in which event the collection must necessarily be from individual assets. Thus the debt is none the less individual because shared jointly by another; each as to the creditor is liable for the whole, unless one is discharged or becomes a legatee thereof.

The right of firm and personal creditors which attaches to the respective partnership or individual assets in marshaling for a general settlement is not a creditor's, but the debtor's privilege.

The liability, we reassert, of joint debtors is personal for the whole amount and differs from a several liability, not in *matter of contribution*, but only where personal service can be had on all joint debtors, in the right to settle the liability of all in one suit. Contribution obtains in cases of several liability to the same extent that it does where the obligation is joint—the only difference being that a several judgment against A does not conclude his co-obligor B as it would were it joint against both.

Now, suppose Waterman and Porter had, in terms, made all of their notes joint and several, *as they did the $7,500 one*, which fact counsel utterly ignores, and Waterman was sued alone, could he not, if he suffered judgment and paid before testator's death, have collected one-quarter of Porter, or might he not, if sued subsequent to the death, have replied the legacy under clause 7?

Surely this court will not allow the circumstance of there being a co-obligor, to limit the legal effect of clause 7. If so, it must do it in cases of several as well as joint debts, and, do it it too, in both cases, although the co-debtor is irretrievably insolvent. In short, it must institute a *post mortem* investigation into the financial *status* of a brother's co-obligor to ascertain testator's legal intention, for it is clear that he did not mean his brothers to pay when they only could be forced. This would give us a rule dependent on the solvency or insolvency of debtors, which would fluctuate even after death, and overturn the established doctrine that bequests in general terms, as, "*any and all notes*, bills, accounts, agreements,

for *other evidences of indebtedness*" includes everything capable of being comprehended under such terms within the disposing power of testator.

Counsel's comment on the fact that the will antedates these notes would not be without some force if it was not an established doctrine that wills speak not from their date, but from the death of testator, or in the language of some jurists, they speak the expiring breath of the decedent, moreover the will itself says "held by me at the time of "my decease."

It is suggested also that in popular language the firm's notes would not be spoken of as Waterman's. Counsel forgets the language of the will. It says: "Any and "all notes," and "any and all * * * agreements, or "*other evidences* of indebtedness against any of my said "brothers."

It seems too plain for argument to again urge that at least these notes were evidences of indebtedness against appellant. If not, they never could be put in proof on a trial, either foreclosing the "agreement" of the security given by appellant alone, or in case he alone was served with process in *assumpsit*. How long would a plea, *actio non*, because in popular language these were not his notes, or this was not his indebtedness, lie?

But the case is even stronger, for it it is shown that Governor Waterman personally and alone mortgaged his mine, worth a million of dollars, to secure the payment of these debts. According to counsel's contention, collection could therefore have been made of the whole amount by a foreclosure of this lien upon his private property.

Counsel misrepresent our contention when he says

(Arg., 9) that we claim that it follows from the statutes concerning joint and several obligations that the firm notes were appellant's individual notes, and Porter was a mere surety. We insist that both were liable for the whole debt; that whether clause 7 is a release or legacy, Porter is discharged so far as testator's estate is concerned. If a legacy to Robert, as we claim, the debt goes to him. As a release of appellant, Porter is also released, and appellant would recover three-fourths of this debt, with interest from date of payment or demand. Of payment, we deem the correct time, because the estate has had its use, and the executors should not have received it.

Whether joint or joint and several, or part joint and part joint and several, the testator was competent to release a co-obligor or make a legacy of the whole debt to him, in which event the firm accounts should treat it as a payment by the legatee. In either view Porter's obligation to the estate ceases. Testator clearly intended, by most sweeping expressions, that none of his brothers or sisters were to be liable, *in any contingency*, to be called on for payment. All assumpsit judgments against partners in Illinois must be against them in their individual names, and may be so in California. It is a narrow view, that, because one debtor could plead the non-joinder of another, therefore testator could not have intended what he said.

It has been held that when joint debtors reside in different states, they may be sued separately in the states having jurisdiction of their respective persons and property.

Brown v. *Birdsall*, 29 Barb., 549.

As a summing up of the case at bar, the decisive points are two:

I. It is indicated quite definitely on the face of the will that every debt (except the two specified debts of John C.) for which a brother could have been held liable to the estate in any way, was given to such brother.

II. The language of the bequest being sufficiently general to include the debts here in question as given to this appellant, such must be the meaning under the established rule of construction.

Respectfully submitted.

WM. R. PLUM,
for Appellant.

143 U.S. 202

Office Supreme Court U. S.
FILED.
JAN 18 1892
JAMES. H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

194 No.

In the Matter of the Application of John Woods and Stephen B. Lovejoy for a Writ of Certiorari or other Proper Order of Certification to the United States Circuit Court of Appeals in and for the Eighth Circuit in a certain Cause in said last-named Court, entitled as follows, viz:

UNITED STATES CIRCUIT COURT OF APPEALS,

EIGHTH CIRCUIT.

JOHN WOODS AND STEPHEN B. LOVEJOY, PARTNERS AS WOODS & LOVEJOY, *Plaintiffs in Error,*

vs.

AUGUST LINDVALL, *Defendant in Error.*

PETITION.

WILLARD R. CRAY,
Counsel for Petitioners.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1891.

In the Matter of the Application of JOHN WOODS *and* STEPHEN B. LOVEJOY *for a Writ of Certiorari or Other Proper Order of Certification to the United States Circuit Court of Appeals in and for the Eighth Circuit in a Certain Cause in said last-named Court entitled, as follows, viz:*

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

JOHN WOODS AND STEPHEN B. LOVEJOY, PARTNERS AS WOODS & LOVEJOY, *Plaintiffs in Error,*

vs.

AUGUST LINDVALL, *Defendant in Error.*

PETITION.

To the Honorable the Supreme Court of the United States:

The undersigned, your petitioners, hereby respectfully represent to this honorable Court and allege that heretofore, to wit, in the winter of 1887 and 1888 and in the spring of 1888, the undersigned, John Woods and Stephen B. Lovejoy, copartners as Woods & Lovejoy, were contractors engaged in

the business of constructing a portion of a railroad bed for the St. Paul & Duluth Railroad Company, at or near a place called Gladstone, in the county of Ramsey and State of Minnesota.

That in and upon said construction work there were employed three different crews of men under as many respective foremen, and that upon or about the 2d day of April, 1888, there was employed one certain common laborer by the name of August Lindvall, who was, by the foreman of the particular crew to which he applied for work, told that he could go to work upon the dump, as it was called, with two or three other common laborers, co-servants of the undersigned, who were working under said foreman.

That said Lindvall continued to work under said foreman, whose name was Alec Murdock, up to and on the 20th day of April following, when, in the progress of said work and while a portion of said crew, among which was said Lindvall, were constructing a temporary trestle in the line of said railroad bed, for the purpose of running out empty Petler cars, after they had been dumped at the end of the dump, in the progress of the work and for temporary purposes only, an accident occurred by the falling of a portion of said temporary trestle, in which accident said Lindvall fell with the trestle and was injured.

That thereafter, and on or about July 24, A. D. 1888, said Lindvall as plaintiff commenced an action in the District Court in and for the county of Hennepin and State of Minnesota, against your petitioners as defendants to recover from said defendants compensation for damages by reason of injuries which he sustained in said accident, on the ground of the alleged negligence of said defendants.

That said District Court then and there was, ever since has been, and yet is a court of general jurisdiction, and had full and complete jurisdiction in said cause of the parties to said action, and of the subject thereof.

That after the commencement of said action such proceed-

ings were duly had therein in said court, that issues were duly joined and said cause came duly on for trial before said court and a jury, duly empaneled and sworn therein, on the 5th day of February, A. D. 1889.

That in and upon said trial said plaintiff produced and introduced all the evidence in his behalf in said cause and rested his case; that thereupon counsel for said defendants duly moved said court to dismiss said cause on the ground that said plaintiff had failed to make out a cause of action against said defendants; that, after hearing arguments of counsel for said respective parties and duly considering the same, said court duly granted said motion and dismissed said cause.

That thereafter such proceedings were duly had in said cause in said court, that said plaintiff duly made and presented to said court his case duly settled and allowed and signed as containing all the proceedings had and all the evidence adduced in said action upon the trial thereof upon the merits of said cause, the testimony of expert witnesses with respect to the nature, character, and extent of plaintiff's injuries only being omitted, and moved said court for a new trial of said cause; that said last-mentioned motion was by said court duly heard and denied, and thereupon said plaintiff duly appealed from the order denying his said motion for a new trial of said cause, to the supreme court of said State of Minnesota, which last-named court had due and full jurisdiction thereof, and is the court of last resort in said State of Minnesota.

That thereafter and on the 25th day of June, A. D. 1889, said cause was, upon its merits and upon the record therein, duly certified by said District Court to said Supreme Court, duly argued, and submitted to said Supreme Court.

That thereafter and on the 15th day of July, A. D. 1889, said Supreme Court did file its decision of said cause in said court upon said appeal and therein and thereby affirmed the order of said District Court, denying to said plaintiff a

new trial of said cause, a true copy of which decision by said Supreme Court of said State of Minnesota is hereto attached, marked "Exhibit A," and made a part hereof.

That thereafter and on July 30, A. D. 1889, judgment was duly rendered and entered in said Supreme Court upon said decision, and mandate therefrom was duly issued and returned and filed in said District Court; whereupon, on September 5th, A. D. 1889, judgment of dismissal and for costs was in said last-named court duly given, rendered, and entered in favor of said defendants and against said plaintiff.

That thereafter and on or about the 12th day of September, A. D. 1889, said August Lindvall, as plaintiff, commenced action in the Circuit Court of the United States, in and for the district of Minnesota, against your petitioners, as partners as aforesaid, as defendants, upon the same cause of action as alleged and set up in said action begun and prosecuted by him in said District Court for said county of Hennepin and State of Minnesota, wherein such proceedings were duly had that issue was duly joined therein upon the merits thereof, and in addition thereto these defendants alleged and pleaded in bar of said last-mentioned action, in their answer in said Circuit Court, said adjudication and disposition of said cause in said State court.

That thereafter and on or about June 21st, A. D. 1890, said cause came duly on for trial before the said Circuit Court, with a jury duly impaneled and sworn therein to try said cause; that upon said hearing and trial, said circuit court, after duly hearing the allegations and proof of said defendants upon said plea in bar, and all the evidence in said cause thereon, and their defense of former adjudication and disposition of said cause in said State courts, and after duly hearing the arguments of the counsel for said respective parties, duly instructed said jury that upon said plea in bar, their verdict should be rendered for said defendants in said action, and that said plaintiff could not recover therein, and that in accordance with said instruction from said court,

said jury then and there upon said trial, duly rendered therein in said court their verdict for said defendants.

That thereupon and thereafter, such proceedings were had in said Circuit Court, that said plaintiff moved said court to set aside said verdict and for a new trial of said cause; that thereafter and on or about July 7th, A. D. 1890, said Circuit Court granted said plaintiff's motion for a new trial of said cause.

That thereafter and on February 3d, 1891, said cause again came on for hearing and trial in said Circuit Court before said court and a jury duly impaneled and sworn therein to try said cause, upon which trial counsel for said defendants duly offered all evidence and records had upon the proceedings, trial, and final determination of said cause in said State court as aforesaid, under said plea in bar, which offer was objected to by said plaintiff's counsel, which objection was by said court sustained, and said evidence excluded; to which ruling of the court counsel for defendants duly excepted.

That the evidence so offered showed indisputably the following facts, viz:

That the same plaintiff had brought an action against the same defendants upon exactly the same cause, for the same injury, in the District Court of the State of Minnesota for the county of Hennepin, a court of general jurisdiction in said State.

That upon the trial of said cause in said district court, after the plaintiff had put in all his evidence and rested his case, the defendants moved said District Court to dismiss said action, upon the ground that the evidence of plaintiff did not make out a case against said defendants, which motion, after due and solemn argument by both defendants and plaintiff, and upon due consideration, was granted by said District Court and said action was dismissed.

That thereupon the plaintiff procured a stay of proceedings and made up and procured to be settled and signed by

the judge who tried the case, a settled case and exceptions, containing all the evidence, and upon the pleadings and such settled case made a motion for a new trial in said District Court; that said motion for a new trial, after due hearing and consideration, was denied by said District Court.

That thereupon said plaintiff, under the practice and procedure in the Minnesota courts in such cases, appealed to the Supreme Court of Minnesota from said order denying the motion for a new trial, and carried to the Supreme Court upon such appeal the pleadings and all the evidence given in the court below.

That the case upon said appeal was duly heard and tried in said Supreme Court, and the decision and order of said District Court was by said Supreme Court duly and in all things affirmed.

That thereupon a mandate issued from said Supreme Court to said District Court for further proceedings in accordance with such decision, and upon the filing of said mandate, judgment in said cause was given and entered in said District Court, as follows, to wit:

"DISTRICT COURT, FOURTH JUDICIAL DISTRICT.

"STATE OF MINNESOTA, *County of Hennepin*, } ss:

"SEPT. 5, 1889.

"AUGUST LINDVALL, *Plaintiff*,
vs.
"JOHN WOODS and STEPHEN B. LOVEJOY, Partners as Woods & Lovejoy, *Defendants*.

"*Judgment.*

"The above-entitled cause being at issue upon the complaint of plaintiff, answer of defendants, and reply of the plaintiff, and being regularly on the calendar of the above-named court for trial at the December, 1888, general term thereof, came duly on for trial before the Hon. J. P. Rea, judge of said court, and a jury.

"The plaintiff appeared by Messrs. Pierce, Arctander & Nickell, his attorneys, and the defendants by Messrs. Shaw & Cray, their attorneys. Thereupon, after the plaintiff had duly opened his case and introduced his witnesses and evidence in said cause and rested his case, and before the final submission of the case, the attorneys for said defendants moved said court for a dismissal of said cause upon the ground that said plaintiff had failed to make out a case against said defendants, which motion was granted.

"And said cause having been afterwards appealed to the Supreme Court of Minnesota by appeal from an order of this court denying said plaintiff's motion for a new trial therein, and said Supreme Court having duly affirmed said order denying a new trial and having duly issued its remittitur to this court, which had been duly filed in this court, now, on motion of Messrs. Shaw & Cray, attorneys for said defendants, it is ordered and adjudged that said action be, and hereby is, dismissed, and that said defendants do have and recover of said plaintiff the sum of seven and $\frac{53}{100}$ dollars for their costs and disbursements of said action, duly taxed and allowed herein.

"By the court:

"C. B. TIRRELL, *Clerk.*"

That said defendants duly moved said Circuit Court, when plaintiff rested his case therein, and again when all the evidence had been introduced therein, to instruct said jury to return a verdict for said defendants in said cause; which motions were each and both denied by said court; to which ruling said defendants duly excepted.

That thereafter and on February 11th, 1891, at the conclusion of said last-mentioned trial, said jury rendered in said Circuit Court a verdict in favor of said plaintiff and against said defendants for the sum of $3,800.00, whereupon judgment was entered in said Circuit Court for said sum, and the costs, which were thereafter taxed and allowed therein and entered and docketed therewith.

That upon the rendition of said last-mentioned verdict, and said entry of judgment, your petitioners, said defendants, duly applied for and were by said court granted a stay

of forty-two days for the purpose of filing a petition for a new trial of said cause, within which time they duly filed their petition for a new trial of said cause in said Circuit Court, and thereafter duly moved said last-named court for a new trial thereof, which motion said court, after hearing counsel for said respective parties, denied, and thereafter such proceedings were duly had in said Circuit Court that said cause and the record therein, upon a bill of exceptions duly signed and allowed by said Circuit Court, was duly removed to the United States Circuit Court of Appeals in and for the Eighth Circuit upon a writ of error, duly authorized and allowed by said Circuit Court.

That thereafter such proceedings were duly had in said cause in said Circuit Court of Appeals that said cause came duly on for hearing and argument therein, at the 1891 October term thereof, to wit, on the 15th day of October, A. D. 1891, in said term, and was duly argued and submitted to said Circuit Court of Appeals, which court thereafter and on October 27th, 1891, filed its decision in said cause affirming the decision of said Circuit Court.

That a copy of the transcript of record upon which said cause upon said writ of error in said Circuit Court of Appeals was heard and argued, is hereto attached, marked "Exhibit B," and made a part hereof.

(A duly certified copy of the entire record having been printed under separate cover to accompany this petition, the same is referred to as said "Exhibit B," and the reprinting thereof as an exhibit to be attached to this petition is by counsel hereby expressly waived.)

That the decision of said Circuit Court of Appeals was rendered by the majority of said court, a minority of said court dissenting therefrom, a true copy of which decision is hereto attached, marked "Exhibit C," and made a part hereof.

(A duly certified copy of the entire record having been printed and accompanying this petition containing a copy

of the decision of said cause in said Circuit Court of Appeals, the same is hereby referred to as said "Exhibit C," and the reprinting thereof as an exhibit to be attached to this petition is by counsel hereby expressly waived.)

And your petitioners allege the following as the specific errors which they claim were committed by such Circuit Court in the trial and determination of said cause therein:

First. That said Circuit Court manifestly erred in refusing to receive in evidence the testimony and evidence offered by said plaintiffs in error, tending to prove and showing the former adjudication of said cause and action in the courts of the State of Minnesota.

Second. That said court manifestly erred in refusing, upon the motion and request of said plaintiffs in error, to instruct and direct the jury to render a verdict in favor of the defendants in that action, the plaintiffs in error herein.

Third. That said Circuit Court manifestly erred in qualifying the third request of said plaintiffs in error to charge, as shown upon page 56 of the Transcript of Record hereto annexed, and assigned for error on page 61 of said Transcript.

Fourth. That said Circuit Court manifestly erred in refusing the thirteenth request of said plaintiffs in error to charge, as shown upon pages 57 and 58 of said Transcript, and assigned for error on pages 61 and 62 thereof.

Fifth. That said Circuit Court manifestly erred in refusing the fourteenth request of said plaintiffs in error to charge, as shown upon page 58 of said Transcript and assigned for error on page 62 thereof.

Sixth. That the said Circuit Court manifestly erred in submitting to the jury the question as to whether the foreman,

Murdock, was a vice-principal of the plaintiffs in error, as shown by the seventh assignment of errors by said plaintiffs in error, on page 62 of said Transcript.

Seventh. That said Circuit Court also manifestly erred in charging the jury in the manner shown in and by the said seventh assignment of errors, as shown in pages 62, 63, 64 and 65 of said Transcript.

Eighth. That said Circuit Court manifestly erred in refusing to grant the motion of said plaintiffs in error to vacate and set aside said judgment, and grant to said plaintiffs in error a new trial in said action, as shown in the eighth assignment of errors by said plaintiffs in error on page 65 of said Transcript.

That your petitioners are pecuniarily interested in the final disposition of said action, and are dissatisfied with the decision against them and feel aggrieved thereby, and, in good faith and not for the purpose of delay, make this application for a writ of *certiorari*, or other proper order of certification by said United States Circuit Court of Appeals in and for the Eighth Circuit, to this Court for review and determination.

That the undersigned have duly applied to and been granted by said Circuit Court of Appeals a stay of mandate in said cause therein to afford them opportunity to apply to your honorable court for a writ of *certiorari* to said Circuit Court of Appeals in said cause, and that such stay will expire on or about the 26th day of December, A. D. 1891.

(A further stay of thirty days has been granted by said Circuit Court of Appeals, as appears by page 83 of the Record.)

Wherefore your petitioners pray that this honorable Court will grant to them a writ of *certiorari*, or such other process, order, or direction as may be deemed proper, to the end that said cause and the record thereof may be certified to the

said Supreme Court from the said Circuit Court of Appeals for the Eighth Circuit, for review and determination by the said Supreme Court.

JOHN WOODS,
STEPHEN B. LOVEJOY,
Petitioners and Plaintiffs in Error.

JOHN M. SHAW and
WILLARD R. CRAY,
Attorneys and Solicitors for Petitioners and Plaintiffs in Error.

STATE OF MINNESOTA, *County of Hennepin,* } ss:

John Woods and Stephen B. Lovejoy came before me personally, and each, being duly sworn, on his oath says that they are the same persons named in and who subscribe the foregoing petition as petitioners; that they have read said petition and know the contents thereof, and that the same and the allegations therein contained are true, as therein stated.

JOHN WOODS.
STEPHEN B. LOVEJOY.

Subscribed and sworn to before me on this 12th day of December, A. D. 1891.

[SEAL.]

WILLARD R. CRAY,
Hennepin County, Minn.

"EXHIBIT A."

AUGUST LINDVALL
vs.
JOHN WOODS and Another.

JULY 15, 1889.

This action was brought in the District Court for Hennepin county, and tried before *Rea*, J., who ordered a dismissal

at the close of the evidence for plaintiff. A new trial was refused, and the plaintiff appealed.

Pierce, Arctander & Nickell, for appellant.

Shaw & Cray, for respondents.

MITCHELL, *J.*:

The defendants were engaged in grading a piece of the line of the St. Paul & Duluth Railroad. The mode of operation was to cut down one part, and with the material taken from the cut to fill a lower part adjacent. The material was conveyed from the cut to the fill in dirt-cars. In the dump these cars were run out on a track laid upon a temporary trestle, constructed with materials (sufficient in quantity and quality) furnished on the ground by the defendants; and as the dump was filled the trestle was extended from time to time, by raising additional bents, and placing stringers and ties thereon. One crew of men worked in the cut filling cars; others drove the teams that drew the cars; others unloaded the cars, and tamped the dirt on the dump; and still another, one Johnson, framed the bents for the trestle, and attended to raising them, and putting in place the stringers and ties for the track; but all the men were subject to be called by the foreman from one department of the work to another. One Murdock was the foreman who had charge of all the men, and who gave them orders where to work and what to do. It also appears that he was in the habit of hiring and discharging men on the work. When Johnson was not engaged on the trestle, he assisted in shoveling on the dump. Whenever he wanted to raise new bents and extend the trestle, he called for help on the foreman, who sent some of the men, usually from the dump, to assist. The plaintiff, a common laborer, was hired by Murdock and set to work on the dump, and that was his usual employment, although it does not appear that his contract of service was limited to any particular department of the work. He did anything he was told to do, and he had been called

upon to assist on the trestle prior to the occasion of the accident. On the day in question, it being desired to raise some bents and extend the trestle, Murdock took plaintiff and one Peterson to assist Johnson. One bent had been raised, and the foreman, Peterson, and plaintiff were on the trestle, attempting to shove out two long stringers so as to reach the new bent, when the trestle upon which they were, fell and caused the injury complained of. The cause of the accident was that the bents of the trestle were not properly braced.

In the law of master and servant there are two familiar rules: First, that the master is not responsible to the servant for the negligence of another servant in the same common employment, unless the master was negligent in the employment of such fellow-servant; second, that the master is bound to use due care in furnishing safe structures or instrumentalities with which the servant is to work, and he is responsible if, through his own negligence or the negligence of other servants employed to furnish them, they are unsafe, and injury follows. We think the facts of this case bring it within the first of these rules. The work which the defendants were engaged in was grading a railroad, and they employed various servants in different departments of labor on that work, but all liable to be called, upon the orders of the foreman, from one department to another. All those engaged in these different departments bore to each other the relation of fellow-servants. They were all serving the same master, under the same control, and all engaged in the same general work. The thing to be done was the building of the road, and the co-operation of all the employés in each department of the work was necessary to bring about that result. The trestle was not a structure furnished by the defendants for their employés to work on, but was itself a part of the work which they were employed to perform. It was a thing which they themselves made, and was as much a part of the construction of the road as was

digging in the pit, loading cars, driving teams, or tamping dirt on the dump (Kelley *vs.* Norcross, 121 Mass., 508; Colton *vs.* Richards, 123 Mass., 484; Kellea *vs.* Faxon, 125 Mass., 485; Peschel *vs.* Railway Co., 62 Wis., 338, 21 N. W. Rep., 269; Gallagher *vs.* Piper, 16 C. B. (N. S.), 669). Johnson was a fellow-servant with plaintiff. It is claimed, however, that Murdock, the foreman, was a vice-principal, and therefore, for any negligence on his part, the defendants were liable.

The authorities upon the question when and under what circumstances the servant becomes the representative of the master are involved in much confusion and conflict, but any one desirous of examining them will find them exhaustively cited and classified in 7 Amer. and Eng. Cyclop. Law, under the head of "Fellow-servants." But, under the doctrines announced in various decisions of this Court, we think it must be held that in the work of constructing this road Murdock was a fellow-servant of plaintiff. In Brown *vs.* Railroad Co., 27 Minn., 162, 6 N. W. Rep., 484, it was held that difference in grade of employment, or in authority with respect to each other, does not remove employés from the class of fellow-servants, as regards the liability of the master for injuries to one caused by the negligence of the other. And, in speaking in that case of the basis upon which this rests, it is said: "If the servant is supposed to assume the risks which the master, with due care and diligence cannot prevent, * * * then he assumes the risks from negligence of those servants who may be placed over him as superior servants or overseers, as well as of those of equal grade with himself; for in respect to such overseers or superior servants, the master, when he has used due care in selecting them, cannot prevent their casual negligence any more than he can prevent the casual negligence of those inferior in grade." On the same ground it was held in Gonsior *vs.* Railroad Co., 36 Minn., 385, 31 N. W. Rep., 515, that "a truck-packer" and the foreman of a round-house were fellow-servants, although the former

was subject to the orders of the latter. In Olson *vs.* Railway Co., 38 Minn., 117, 35 N. W. Rep., 866, it was held that a section foreman and the section-men were fellow-servants; and in Brown *vs.* Railway Co., 31 Minn., 553, 18 N. W. Rep., 834, it was said that one employé becomes a vice-principal, as respects another, only when he is intrusted with the performance of some absolute and personal duty of the master himself, such as the providing of proper instrumentalities with which the service of an employé is to be performed, or the general management and control of the master's business or some branch of it. In the cases of Fraker *vs.* Railway Co., 32 Minn., 54, 19 N. W. Rep., 349, and Tierney *vs.* Railway Co., 33 Minn., 311, 23 N. W. Rep., 229, the question whether the negligent employés were vice-principals or fellow-servants was made to depend, not upon their grade or rank, but upon the nature of the service which they performed; in the former case the defendant being held not liable because it was a servant's and not a master's duty which the employé was discharging, and in the latter the defendant being held liable because the employé was discharging a master's and not a servant's duty.

The result of these decisions would seem to be that it is not the rank of the employé or his authority over other employés, but the nature of the duty or service which he performs, that is decisive; that whenever a master delegates to another the performance of a duty to his servant which rests upon himself as an absolute duty, he is liable for the manner in which that duty is performed by the middleman whom he has selected as his agent, and to the extent of a discharge of those duties by the middleman, however high or low his rank, or however great or small his authority over other employés, he stands in the place of the master; but as to all other matters he is a mere co-servant. It follows that the same person may occupy a dual capacity of vice-principal as to some matters, and of fellow-servant as to others. Hence, in the present case, if the defendants dele-

gated to Murdock, the foreman, the duty of employing laborers for this work, or of providing materials for the building of the trestle, and he had been guilty of negligence in employing incompetent men, or in furnishing improper material, the defendant would be liable, for these are duties which the master owes personally and absolutely to his servants. But in whatever he did on the work, which was the object of their common employment, viz., the building of this road, he was a mere fellow-servant with the laborers subject to his orders; and for his negligence in such matters the defendants would not be liable unless they were negligent in employing him, of which there is no claim.

It is urged upon the argument that Murdock was negligent in employing Johnson, an incompetent person, to build the trestle. It is sufficient answer to this to say that this is not the negligence charged in the complaint. It is sought to bring the case within the rule of Cook *vs.* Railway Co., 34 Minn., 45, 24 N. W. Rep., 311, where the defendant was held liable for an injury received by the plaintiff while temporarily engaged, under the orders of the superintendent, in a work wholly outside of that for which he entered its service, and outside of the line of the defendant's usual business. Both of the facts upon which that case was made to turn are wholly wanting in this. The work in which plaintiff was engaged when injured was not outside of that for which he entered the service, and it was directly within the line of defendants' usual business. Whatever negligence there was in this case on the part of either Johnson or Murdock (within the allegations of the complaint), was in the common employment of building the road, as to which they were fellow-servants of the plaintiff. Therefore the action was properly dismissed.

Order affirmed.

SUPREME COURT OF THE UNI

OCTOBER TERM, 1

No.

UNITED STATES CIRCUIT

Eighth Circuit.

WOODS and STEPHEN S. LOVEJ

Woods & Lovejoy, Plaintiffs in Err

vs.

AUGUST LINDVALL, Defendant in Err

Argument and Preliminary Brief

with Petition.

WILLARD S. C

gated to Murdock, the foreman, the duty of employing laborers for this work, or of providing materials for the building of the trestle, and he had been guilty of negligence in employing incompetent men, or in furnishing improper material, the defendant would be liable, for these are duties which the master owes personally and absolutely to his servants. But in whatever he did on the work, which was the object of their common employment, viz., the building of this road, he was a mere fellow-servant with the laborers subject to his orders; and for his negligence in such matters the defendants would not be liable unless they were negligent in employing him, of which there is no claim.

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Order affirmed.

Office Supreme Court U. S.
FILED.
JAN 18 1892
JAMES. H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. .....

In the Matter of the Application of John Woods and Stephen B. Lovejoy for a Writ of Certiorari or other Proper Order of Certification to the United States Circuit Court of Appeals in and for the Eighth Circuit in a certain Cause in said last-named Court, entitled as follows, viz:

UNITED STATES CIRCUIT COURT OF APPEALS,

EIGHTH CIRCUIT.

JOHN WOODS AND STEPHEN B. LOVEJOY, PARTNERS AS WOODS & LOVEJOY, *Plaintiffs in Error,*

vs.

AUGUST LINDVALL, *Defendant in Error.*

Statement and Preliminary Brief submitted with Petition.

WILLARD R. CRAY,
Counsel for Petitioners.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. —.

In the Matter of the Application of JOHN WOODS *and* STEPHEN B. LOVEJOY *for a Writ of Certiorari or other Proper Order of Certification to the United States Circuit Court of Appeals in and for the Eighth Circuit in a Certain Cause in said last-named Court entitled, as follows, viz:*

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

JOHN WOODS AND STEPHEN B. LOVEJOY, PARTNERS AS WOODS & LOVEJOY, *Plaintiffs in Error,*

vs.

AUGUST LINDVALL, *Defendant in Error.*

Statement and preliminary brief submitted with petition.

Inasmuch as the practice under this act in the matter of such applications may not have been prescribed or settled, we have deemed it advisable and proper to submit with the

petition a brief statement in explanation of the grounds upon which it is made.

Since the petition was drawn the Circuit Court of Appeals granted further stay to enable the petitioners to make this application, which stay will expire on January 26th, 1892, unless further stay be granted.

This is an application to the Court to require the United States Circuit Court of Appeals for the Eighth Circuit, by certiorari or other proper order of certification, to certify to this Court for its review and determination the case above mentioned, in which a final judgment was rendered by the Court of Appeals against the petitioners on the 27th day of October, A. D. 1891.

The application is made under section 6 of the act of Congress of March 3d, 1891, creating and prescribing the jurisdiction, etc., of Circuit Courts of Appeal, as follows:

"And excepting also that in every such case as is hereinbefore made final in the Circuit Court of Appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

The Court has by its rules provided that when an application is made to it under the act "a certified copy of the entire record of the cause in the Circuit Court of Appeals shall be furnished to this Court by the applicant as a part of the application."

The act provides that "the Circuit Court of Appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it *desires* the instruction of that Court for its proper decision."

The power and duty of this Court to require a proper case to be certified to it are not made to depend at all upon the action or desire of the Circuit Court of Appeals in respect to the case. In fact, it seems to us that parties have no *right*

to ask the Circuit Court of Appeals to request the instruction of this Court in regard to what the proper decision of the Circuit Court should be in any case.

In the present case the Circuit Court of Appeals adjourned its October session on the very day the decision was filed and judgment entered, to wit, October 27th, A. D. 1891; but it has granted to the petitioners herein a stay of proceedings to enable them to make this application to this Court. The orders for stay expressly so state. This we regard as a very distinct statement by that court that it does not *desire* the instructions of this Court, and that the matter of bringing the case here rests entirely with this Court.

The deciding of the case by the Circuit Court of Appeals without requesting any instructions from this Court and granting a stay "to enable the plaintiffs in error to make application to the Supreme Court of the United States for a writ of certiorari in this cause," is certainly, in legal effect, a refusal on the part of the court below to certify any questions to this Court.

The case is an important one, and there are two principal grounds of error complained of:

First. That the Circuit Court erred in refusing to admit, and in rejecting our defense of former adjudication in the courts of the State of Minnesota.

Second. That the Circuit Court erred in its rulings upon the merits of the cause itself, as specified in our petition.

The first is probably a new question, and we consider it highly important in this, that the decision of the Circuit Court and the Court of Appeals of the Eighth Circuit is to the effect that, in addition to the superior privilege which foreign-born residents who have simply declared their intention to become citizens, but who have not become citizens of the United States, have of choosing their forum in either the State or the United States courts, they may also have the

privilege of experimenting in the State courts, and, being there defeated upon the actual merits of a cause, may again bring the same case in the United States Circuit Court of the district and State where they are residing and procure a second adjudication; and that this also seems to establish that they may also experiment in the United States courts in the same way, and, being there defeated upon the actual merits of the cause, may again sue upon the same cause of action in the State courts.

The Circuit Court and the Circuit Court of Appeals placed their decision upon the alleged ground that the matter was purely one of local State law, and that, as it seemed to them, the statute of Minnesota, as construed by the Supreme Court of that State, was to the effect that when a cause was dismissed, upon motion of the defendant, upon the ground that the plaintiff had, after putting in all his evidence and resting his case, failed to make out a case or cause of action, and final judgment of dismissal and for costs was rendered against the plaintiff, such decision and judgment was not upon the merits, and therefore not a bar to another suit.

Our contention was and is—

First. That the statute of Minnesota, fairly construed, is not to that effect.

Second. That the Supreme Court of that State has not so authoritatively and finally decided, but that its latest authoritative decision is the other way.

Third. That even if the statute of Minnesota is so and has been so construed by the courts of that State, the United States courts ought not to be and are not bound by such a State statute in a case where it is apparent that there has been in fact and law a decision of a cause upon its substantial and actual merits.

The decision of the Supreme Court of Minnesota above re-

ferred to is the case of Thomas *vs.* Joslin, 36 Minn. Rep., page 1, in which, as we understand it, a final judgment of dismissal and for costs in favor of a defendant and against a plaintiff, such as was given in this case, in pursuance of a motion made by the defendant, after the plaintiff had put in his evidence and rested, such as was made in this case, was upon a plea of former adjudication, held by the Supreme Court of Minnesota to constitute a bar to the maintenance of a second action for the same cause, brought in the District Court of Minnesota (the court of general jurisdiction in that State). The subsequent case of Conrad *vs.* Baldwin, 44 Minn., 406, although in its syllabus it might seem to declare in general terms that such a decision was not upon the merits, will, we submit, upon careful inspection, be found not to present the question. It was in itself simply an appeal from a taxation of costs, not in any way involving the merits of the action, and the record in that case discloses that there was in truth no resting of his case by the plaintiff, no submission by him to the court of the case, no motion by the defendant to dismiss, but that the court of its own motion, seeming to think that the plaintiff could not make out a case, peremptorily dismissed it without any evidence whatsoever having been received on either side.

Upon the last point we argued and still insist that, even if such is the statute of Minnesota, United States courts ought not to be bound by it.

When a defense of former adjudication is presented, it ought to be and is peculiarly the province of the court to which it is presented, to decide whether or not there has been substantially and in truth a former adjudication upon the merits of the same action. The doctrine of former adjudication is a protective doctrine—that is to say, it is to enable the court in which the action is brought to protect itself against a repeated and further trial and adjudication of a cause of action which has once before been decided and adjudicated upon its substantial merits. When, therefore,

this United States court was called upon to decide in this case upon an alleged defense that the same case had been before adjudged upon its actual merits in a court of competent jurisdiction, it was for that court to ascertain and decide for itself as to whether such was the case, and it ought not to permit and could not permit its judgment of that question, upon familiar principles of jurisprudence, to be swayed or governed by any peculiar provisions of any statute of any State, which purported to say that a decision or judgment which was, upon established and elementary principles, a decision and judgment upon the merits, was not so. If the legislature of the State of Minnesota assumes to say that an actual decision upon the merits of a cause is not such, perhaps it can bind its own courts in its own jurisdiction to so hold, but it ought not to be permitted to bind and compel the Federal courts to hold any such absurdity. When a Federal court is called upon to decide a case and it is alleged in defense that the case has once been tried and determined upon its merits by a court of competent jurisdiction, we think the Federal court may and ought to ascertain for itself and for its own protection whether that plea is in fact and law a true one—*i. e.*, whether the case has been so tried and determined, and, if it has, to refuse to try it again.

The case was in the Minnesota courts determined upon what was in substance a demurrer to the evidence of the plaintiff. That such a decision is upon the merits, we do not now deem it necessary to cite authority or produce further argument to this Court.

The last decision of Mr. Justice Miller and Judge Nelson upon this question in circuit, is reported in Volume 47, pages 195 to 198, of the Federal Reporter. We desire to call brief attention to the reasons there assigned for reversing the former holding of Judge Nelson, to the effect that the former adjudication was a bar. Judge Nelson says:

"The District Court of the State, upon the motion to dismiss only determined the case as far as plaintiff's evidence

was concerned. The only question presented to it was: Has the plaintiff by the evidence introduced by him, given sufficient proof of his being entitled to the relief he asks for in his complaint? It does not pretend to determine the controversy or to adjudicate who is right or who is wrong, but simply said that upon the evidence on behalf of the plaintiff, which we now have before us, we cannot allow the plaintiff to take the opinion of the jury on his case. At that time the plaintiff could of his own motion have taken dismissal, which certainly would not have been a bar, and he is in no worse position that the court, on motion of the opposite party, only does what the plaintiff could himself have done. Defendants introduced no evidence, nor did they rest their case and ask the court to pass upon the merits of it or adjudicate upon the respective claims of the parties."

When the District Court of the State determined the case as far as plaintiff's evidence was concerned, having before it all his evidence, did it not determine it upon the merits of his case? When it said that upon all the evidence introduced by him he was not entitled to any relief, did it not say that there were no merits in his case? There was no controversy between the plaintiff and defendants, except that the plaintiff made a claim against the defendants, which defendants denied. The defendants introduced no counterclaim, and when the court adjudged that upon the full showing of the plaintiff he had no claim, did it not determine the controversy, and did it not adjudicate that the plaintiff was wrong? It is doubtless true that at that time the plaintiff might of his own motion have taken a dismissal or nonsuit, and that that would have left him with his case unadjudicated. But he did not do so. He chose rather to submit his case to the judgment of the court on its merits, and the judgment of the court was against him. It seems to us to follow from this that he *is* in a worse position than he would have been had he taken a voluntary nonsuit. It is true, also, that the defendants introduced no evidence; but it is not true that they did not ask the court to pass upon the

merits of the case or adjudicate upon the claim of the plaintiff. That is just what they did do. There were no *respective affirmative claims* of the parties; there was only one affirmative claim, and that was the claim of the plaintiff. The court heard his case—all his evidence—and said that he had no claim.

Mr. Justice Miller, in speaking of the embarrassment which he experienced from reading a late decision of the Supreme Court of the State, doubtless referred to the case cited above, Thomas *vs.* Joslin, 36 Minn., 1. He says: "That was an equity case, in which there was no jury to pass upon the issues, and the court, although the disposition of the case was perhaps in the form of a dismissal, finds that substantially it was a decision upon the merits;" and later adds: "I suppose it was a decision on the merits, being an equity case, and that the term 'dismissal of the bill' really meant an adjudication on the merits." The statute of Minnesota is fully set forth in the decision of the Circuit Court of Appeals annexed to the petition. In the State of Minnesota the distinctions between actions at law and suits in equity and *forms* of actions are abolished, and there is but one vehicle for the enforcement of civil rights and remedies, known as the "civil action." (See § 1, chap. 66, Gen'l Stats. of Minn.) The sections concerning dismissals of actions set forth in the decision of the Circuit Court of Appeals are sections 262 and 263 of the same chapter. That section refers to "*the action*" generally, and makes no distinction whatever between legal and equitable actions. It means evidently *any civil action*. We might add that the subsequent case of Conrad *vs.* Baldwin, in 44 Minn., relied upon by the Circuit Court of Appeals, and which we have before commented upon, was an equitable action, and although, as we have said, we do not think that case ought to be considered as an authoritative decision upon this question, still it may serve to illustrate our contention, that there is certainly no difference in the application of this statute as between equitable and legal actions.

It is familiar procedure in the United States Circuit Courts, certainly in the Minnesota district, that when plaintiff rests, after putting in all his evidence, the defendant may, without resting his case, move the court to instruct the jury to render a verdict for the defendant upon the ground that the plaintiff has failed by his evidence to make out a cause of action. This is substantially a demurrer to the evidence. If such motion be granted and a verdict rendered in accordance with such direction, a judgment upon such verdict is upon the merits, and a bar to further adjudication of the same cause of action.

It is impossible to state any substantial distinction between such a procedure and such a judgment, and the procedure and judgment in the Minnesota courts, where the form which the motion takes is that the action be dismissed upon precisely the same grounds.

Referring again to the Minnesota decisions upon this question, those in which it has really been considered are State of Wisconsin *vs.* Torienus, 28 Minn., 175; Boom *vs.* St. Paul F. & M. Co., 33 Minn., 253; Craver *vs.* Christian, 34 Minn., 397; Andrews *vs.* School District, 35 Minn., 70; Thomas *vs.* Joslin, 36 Minn., 1.

We confidently claim that the rule fairly deducible from all these cases is to the effect that when a plea of former adjudication is presented, the court may and will look into the whole record of the former case and ascertain whether the case was in truth and fact substantially presented and determined upon its actual merits.

Looking into the record of this case in the State court for that purpose, we also confidently claim that there can be but one conclusion about it, and that is that it was tried and determined upon its actual merits.

We will annex here an extract from our brief in the Circuit Court of Appeals upon the construction of this Minnesota statute, considered as a question of first impression.

"Indeed, if this might be considered for a moment as a

question of *first impression*, a construction of this statute would be suggested which would avoid all difficulty and be perfectly consonant with what has always been and ought to be the uniform principle of the estoppel appertaining to the deliberate judgments of courts.

"The statute declares that the 'action *may* be disposed of without a final determination of its merits in the following cases.'

"It then defines the cases in which this *may* be done. I suppose what we must understand by a *final* determination is a *final judgment.*

"If there is a *final judgment*, then there is a *final determination.*

"The question, then, might still remain, Whether, in a given case, *the judgment or determination was upon the merits?*

"The statute seems to recognize that in certain cases there may be a judgment which is not upon the merits, but it seems also to define just what those certain cases are.

"It is to be noted that only *once* in section 262, *supra*, is a *judgment mentioned.* That is in the last subdivision, which expressly declares that 'The dismissal mentioned in the *first two subdivisions* is made by an entry in the clerk's register and a notice served on the adverse party; *judgment may thereupon be entered accordingly.*'

"We suppose we might, upon well-settled principles, include in this a voluntary nonsuit or dismissal taken by the plaintiff in open court upon an attempted trial and without any submission, which would be substantially the same thing, because if there was no submission there was no trial, and the withdrawal would then be *before trial.*

"The statute, section 262, expressly and only provides for '*judgment accordingly*'—*i. e.*, upon and according to the voluntary dismissal or nonsuit by the plaintiff himself—in the cases where the plaintiff himself moves for a dismissal or

nonsuit. In that way he may avoid a trial upon the merits, and may save his right to bring another action.

"Now, the next section, 263, declares that in *every case other* than those mentioned in the last section, 262, the *judgment shall be rendered on the merits.* The only cases mentioned in the last section, 262, of the *entry of judgment*, are those of voluntary dismissal or nonsuit by the plaintiff on his own motion. Therefore, if the plaintiff does not voluntarily suffer or take a dismissal or nonsuit, but insists upon submitting his case to the court for determination upon issue of either law or fact or both, the judgment thereupon rendered *is* upon the merits.

"And, again, we call especial attention to the third subdivision of section 262, chapter 66, Statutes of Minnesota, *supra*, which is the subdivision relied upon by the plaintiff and which is in the following language:

"*Third.* 'By the court where, upon the trial *and before the final submission of the case*, plaintiff abandons it or fails to substantiate or establish his claim or cause of action or right to recover.' We submit that the words in this subdivision 'and before final submission of the case' qualify and limit the entire effect of it—that is to say, it means that *before finally submitting his case* the plaintiff may announce that he abandons it and may take a voluntary dismissal; or it may be apparent to the court *before such final submission* that by reason of the plaintiff's inability for some adventitious cause to establish an essential fact pleaded, he cannot recover; cannot try his case upon the merits, such as seemed to be apparent in Conrad *vs.* Baldwin, 44 Minn., 406, *supra;* and then the court may, as it did in that case, of its own motion, dismiss the case.

"Such dismissal, abandonment, or nonsuit would not be a trial upon the merits.

"But it would not be so if the plaintiff, having a good cause of action pleaded, and having had his full opportunity to, and having put in and submitted all his evidence, and hav-

ing submitted his case by resting it, and having also further submitted it by joining issue with the defendant upon a demurrer by the defendant to his evidence, invokes from the court a judgment upon the merits of his case, as so submitted. Such, to all intents and purposes, would be *a final submission* and the adjudication upon it a final adjudication on the merits.

"What is a final submission? When a plaintiff has put in all his evidence and *rested his case*, is that less than a final submission by him? He cannot say that the defendant has any evidence. He has no right to presume that he has. It is his privilege and duty to make his case in chief. It is expected of him, and he knows it. Therefore when he rests upon his evidence he submits his case to the judgment of the court, and that submission is final for him. Even if he could presume that the defendant would offer evidence, he could not presume that it would add anything to his case or aid him in any way.

"When the plaintiff declares that he *rests his case* he declares that he *submits* it on its merits. The defendant then says, 'I demur to your showing and submit it to the judgment of the court that you have no meritorious case.' The plaintiff joins in this demurrer. The court decides that plaintiff's case has no merits and dismisses it."

The other principal question is upon the alleged error of the Circuit Court upon the merits of the cause itself.

It is presented by the alleged error of that court in refusing to direct the jury to render a verdict for the defendants, plaintiffs in error. It is also presented in the alleged error of that court in refusing to give the requests to charge of the defendants, plaintiffs in error. The principal question upon which the controversy and argument hinged was as to the character or relation of the foreman, Murdock—whether he was a vice-principal, representing the defendants, or a co-servant with plaintiff. If the former, it was claimed that there was some evidence of negligence on his part for which

the defendants were chargeable, because he represented them. If the latter, whatever negligence he may have committed, it was that of a fellow-servant, for which the defendants were not liable. The Circuit Court submitted that question to the jury, thereby deciding directly the opposite of the Supreme Court of Minnesota, which in the same case, upon the same cause of action, and upon substantially the same evidence, had decided that the foreman, Murdock, was, as a matter of law, a co-servant and not a vice-principal.

It will be seen, therefore, that the case is also important in that it presents a square conflict of decision upon a vital question of the liability of employers between the State court and the Federal courts in the same territorial jurisdiction. Of course, notwithstanding this, if the decision of the Federal court is right upon principle and authority, it must be sustained; but we strenuously contend that it is not right.

The Circuit Court of Appeals, in deciding it, based its decision upon the authority of the C., M. & St. P. R'y Co. *vs.* Ross, 112 U. S., 377, claiming that this case was analogous to that case.

We contended, and, with due respect to that learned court, still insist, that the cases are not analogous, but are very wide apart. It seems to us that the Circuit Court of Appeals has in this case gone far beyond the doctrine of this Supreme Court in the Ross case, and has stretched the doctrine of vice-principal and the doctrine in the Ross case, distinguishing that case from and taking it out of the established rule of the non-liability of employers for the negligence of co-employees, to a tension far beyond what this Court ever intended in the Ross case, and, as we believe, in the teeth of what this Court has since, in subsequent cases, decided. The Court of Appeals also cites the case of N. P. R'y Co. *vs.* Herbert, 116 U. S., 642. That was the case in which the familiar doctrine that a railroad company is absolutely responsible to its employés for the sufficiency and

safety of the cars, locomotives, etc., which it uses upon its road, which the employé himself has no part in providing or keeping in repair; and that a railroad company cannot shift that responsibility by delegating the duty of keeping its cars, etc., in repair to another person; and if it is so delegated that other person represents the company. The case is not analogous to this case. We will cite the case of Coyne *vs.* U. P. R'y Co., 133 U. S., 370, and the case of Quebec S. S. Co. *vs.* Merchant, 133 U. S., 375.

The effect of the decision of the Circuit Court of Appeals is and will be, if established, in short, that every foreman of a gang of laborers employed by contractors in the work of railroad grading or similar work, is a vice-principal, standing in the shoes of his and his fellow-laborers' common employer, and that the common employer is responsible to the other employés for his every act of omission or negligence; and this even when the foreman is at the time actually engaged in active assistance of the other laborers, including the plaintiff, in the doing of the work in hand. It is, we believe, perfectly apparent on the face of this record that the relation of Murdock to his employers and the other employés was simply that of the ordinary foreman of a gang of laborers, and that he was at the very time of the happening of the accident, engaged in assisting the plaintiff and other co-employés in the work, and that the proximate cause of the accident, was an omission by all of them to take necessary precautions.

We have not believed that this Court will be prepared to sustain such a doctrine.

The Supreme Court of Minnesota held that the structure in this case, being a mere temporary trestle used in the doing of the work in hand, which had to be put up and erected from day to day as the progress and exigencies of the work required, to facilitate, and in and about the carrying on of the general work, it was a part of the general work, and that in and about that work, viz., the putting up

from time to time of this temporary trestle—that is to say, the raising and adjusting of the bents upon the ground, and the extending of stringers, ties, and track upon them, participated in by the plaintiff and other employés with the foreman—the plaintiff and foreman were co-employés.

The Circuit Court of Appeals rejected this and held that the situation and relation of the foreman, Murdock, was analogous to that of the conductor upon a train of cars under a rule of the company, which gave him sole and absolute control of the running of the train, as in the Ross case, and to that of an agent appointed by a railroad company and vested with especial and sole charge of keeping the cars, locomotives, etc., in repair, as in the Herbert case.

The decision of the supreme court of Minnesota finds express support in the case of Armour *vs.* Hahn, 111 U. S., 313.

It may not be amiss to note that Judge Hallett, who sat in the Court of Appeals in this case, dissented from the decision and, as we understand, based his dissent substantially upon the doctrine enunciated by the Supreme Court of Minnesota in the same case, which he approved as the sound rule.

It is respectfully submitted that the Court should permit the petitioners to be heard, by their counsel, upon the questions as to whether said former adjudication of said cause in the State courts of Minnesota is not a bar, and as to whether an ordinary foreman upon construction work, as in this case, is or is not a vice-principal, and for those purposes grant the present application.

WILLARD R. CRAY,
Counsel for Petitioners.

Office Supreme Court U. S.
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. .....

In the Matter of the Application of John Woods and Stephen B. Lovejoy for a Writ of Certiorari or other Proper Order of Certification to the United States Circuit Court of Appeals in and for the Eighth Circuit in a certain Cause in said last-named Court, entitled as follows, viz:

UNITED STATES CIRCUIT COURT OF APPEALS,

EIGHTH CIRCUIT.

JOHN WOODS AND STEPHEN B. LOVEJOY, PARTNERS AS WOODS & LOVEJOY, *Plaintiffs in Error,*

vs.

AUGUST LINDVALL, *Defendant in Error.*

RESPONDENT'S BRIEF.

JOHN W. ARCTANDER,
Attorney for Respondent.

JOHN LIND,
Of Counsel.

Beresford, Pr., Washington, D. C.

IN THE

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RESPONDENT'S BRIEF.

The grounds upon which the application is made for a writ of *Certiorari* in this case are stated by the petitioner's counsel on page 3 of his brief as follows:

First. That the Circuit Court erred in refusing to admit, and in rejecting our defense of former adjudication in the Courts of the State of Minnesota.

Second. That the Circuit Court erred in its rulings upon the merits of the cause itself, as specified in our petition.

It is confidently believed that ample arguments could be adduced and numerous authorities cited in support of the decision of the Circuit Court of Appeals, did we deem such a course necessary. But in the view we take of the case, we shall limit our suggestions to a statement of what we believe to be the true intent and the proper construction of the statute under which this application is made.

This Court is well aware of the fact that the Act of March 3d, 1891, creating the Circuit Court of Appeals, was not passed in response to a demand for an intermediate court of review, but for the sole purpose of relieving the congested condition of the docket of the Supreme Court. During the many years that the subject was under discussion in Congress no desire was expressed by any member of that body for a Circuit Court of Appeals, as such. Its creation was only advocated and consented to as an expedient for relieving the Supreme Court from being overwhelmed with the constantly increasing work of that tribunal. Various expedients were suggested,—the division of the Court into sections, &c.,—but none met the approval of the two Houses except the plan embraced in the act which became the law. This act originated in the Judiciary Committee of the House of Representatives, and proceeded on the theory that the only safe course of legislation for the relief of the Supreme Court, was by the creation of a Circuit Court of Appeals whose decisions should be final on that large class of litigation in the Federal Courts which is dependent upon the character of the suitors, as citizens or aliens, and some others which we need not enumerate. But to retain uniformity in our jurisprudence, and to avoid conflict in the decisions of these several Circuit Courts of Appeal, the House Bill contained the provision which, after amendment in the Senate, became the law, giving the Supreme Court supervisory powers even in this class of cases to the end that the symmetry of our jurisprudence should not be impaired. And the House Report on the bill explaining this

feature states that in furtherance of this object, "questions arising in this class of cases of a novel, difficult, or important character may be certified to the Supreme Court, &c."

In the other House no formal report was made on the measure, but Senator Evarts, who had charge of the bill in the Senate, used the following language in explaining the provision now under consideration: (Page 10,222, Cong. Rec. 1st sess. 51 Cong.)

"Mr. President, another guard against the occurring diversity of judgments, or of there being a careless or inadvertent disposition of important litigation by these courts; I should deprecate any opinion in advance that these courts would not fully meet the interest and confidence that should be invited for them, but still there should be something besides a mere judgment within these courts as to what ought to be reviewed in the interest of jurisprudence and uniformity of decision, and that is that the Supreme Court shall have a right, in any of these cases that are thus made final, by certiorari, to take up to itself for final determination this or that case, and in that way the scheme of the committee does firmly and peremptorily make a finality on such subjects as we think in their nature admit of finality, and at the same time leaves flexibility, elasticity and openness for supervision by the Supreme Court."

These views are in harmony with the object of the legislation as above suggested, and the comments in the report of the House of Representatives. And we feel justified in submitting this proposition—that while the Supreme Court, under the law, has the power to take before itself any case decided by the Circuit Court of Appeals, the exercise of this power should be limited to cases involving questions of a *novel*, *difficult* or *important* character. The adoption of a different rule would defeat the whole object of the law and place the Supreme Court in a worse plight than it was before the passage of this act. The judgment in this case is for $3,942.50. Before the passage of the act referred to, this case could not

have been brought here for review. If the Court should hold that it can now, we can conceive of no cases that would be excluded.

This case presents no *novel*, *difficult* or *important* questions.

As to whether the proceedings had in the State courts, before the commencement of this action in the Federal courts, were of such character as to constitute a bar to this action, depends solely upon questions of fact, both as to what was actually done in the State courts, and as to the status of the decisions of the Supreme Court of the State of Minnesota on the question as to what proceedings on the part of a litigant will constitute a bar to the bringing of a new suit for the same cause of action.

As to the other ground urged, it is probably safe to say that no question has received fuller consideration in the circuit from which this case comes than the law governing the responsibility of the master to his servant for injuries received in the course of his employment.

In conclusion, we beg leave to also call the attention of the Court to the fact that this application can only be granted by the Supreme *Court*. Had the writ of *certiorari* been intended to serve the purpose of bringing up this class of cases, generally, for review, the statute would undoubtedly have authorized its issuance on the order of the Chief Justice, or of one of the Associate Justices of this Court.

Respectfully submitted,

JOHN W. ARCTANDER,
Attorney for Respondent.
JOHN LIND, *of Counsel.*